

NVB 5011 (Rev. 5/16)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

IN RE:

DOUBLE JUMP, INC. ,

Debtor(s)

BK-19-50102-gs
CHAPTER 7

Adversary Proceeding:

21-05072-gs

CHRISTINA W. LOVATO

Plaintiff(s)

TRANSMITTAL OF
MOTION OF WITHDRAWAL OF
THE REFERENCE

vs

NIXON PEABODY LLP

Defendant(s)

Nixon Peabody, LLC

Movant(s)

vs

Christina Lovato, Trustee

Respondent(s)

To: U.S. District Court
Bruce R. Thompson Federal Building,
400 Virginia Street,
Reno, NV 89501

Withdrawal of Reference Filed in the Same Bankruptcy Case
or in a Related ADV Case

not yet assigned

Movant(s) and Respondent(s) are to file all matters relating to the Motion to Withdraw the Reference with the Clerk of the District Court. All documents relating to other matters in this case shall continue to be filed with the Clerk of the Bankruptcy Court.

Dated: 6/7/22

Mary A. Schott
Clerk of Court

add note show notes

JRYTRL, WDREF

**U.S. Bankruptcy Court
District of Nevada (Reno)
Adversary Proceeding #: 21-05072-gs**

Assigned to: GARY SPRAKER

Date Filed: 10/25/21

Lead BK Case: 19-50102

Lead BK Title: DOUBLE JUMP, INC.

Lead BK Chapter: 7

Demand: \$120000000

Nature[s] of Suit: 13 Recovery of money/property – 548 fraudulent transfer
02 Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)

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Filing Date	#	Docket Text
11/24/2021	<u>17</u>	Motion for Withdrawal of the Reference . Fee Amount \$188. Filed by LOUIS M. BUBALA III on behalf of NIXON PEABODY LLP (Attachments: # <u>1</u> Exhibit A, J. Caroff Plea Agreement # <u>2</u> Exhibit B, Nixon Proof of Claim 34 # <u>3</u> Exhibit C, Complaint, Solarmore v Nixon # <u>4</u> Exhibit D, Complaint, Solarmore v Bankruptcy Estate # <u>5</u> Exhibit E, Order, Melech v Polhill # <u>6</u> Exhibit F, Order, USACM v Compass) (BUBALA, LOUIS) (Entered: 11/24/2021)
01/14/2022	<u>36</u>	Trustee's Response <i>In Opposition</i> with Certificate of Service Filed by MICHAEL S. BUDWICK on behalf of CHRISTINA W. LOVATO (Related document(s) <u>17</u> Motion for Withdrawal of the Reference filed by Defendant NIXON PEABODY LLP.) (BUDWICK, MICHAEL) (Entered: 01/14/2022)
02/04/2022	<u>52</u>	Reply Filed by LOUIS M BUBALA III on behalf of NIXON PEABODY LLP (Related document(s) <u>36</u> Response filed by Plaintiff CHRISTINA W. LOVATO.) (Attachments: # <u>1</u> Exhibit A) (BUBALA, LOUIS). Modified on 2/7/2022 to replace relationship to doc #36 (Hannan, KS). (Entered: 02/04/2022)

1	KEKER, VAN NEST & PETERS LLP ELLIOT R. PETERS epeters@keker.com ERIC H. MACMICHAEL emacmichael@keker.com <i>Will comply with LR IA 11-2 within 14 days of first appearance on Nov. 19, 2021</i> 633 Battery Street San Francisco, CA 94111-1809 Telephone: 415 391 5400 Facsimile: 415 397 7188	2	KAEMPFER CROWELL LOUIS M. BUBALA III - # 8974 lbubala@kcnvlaw.com 50 W. Liberty St., Ste. 700 Reno, NV 89501 Telephone: 775 852 3900 Facsimile: 777 327 2011
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7 Attorneys for Defendant Nixon Peabody LLP
8

9	UNITED STATES BANKRUPTCY COURT
10	DISTRICT OF NEVADA
11	In re
12	DOUBLE JUMP, INC.,
13	Debtor.
14	
15	<input checked="" type="checkbox"/> Affects DC Solar Solutions, Inc. ____ Affects DC Solar Distributions, Inc. ____ Affects DC Solar Freedom, Inc. ____ Affects Double Jump, Inc.
16	
17	
18	CHRISTINA W. LOVATO, Plaintiff, v. NIXON PEABODY LLP, Defendant.
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Lead Case No. BK-19-50102-gs
(Chapter 7)

Jointly Administered with:

19-50130-gs DC Solar Solutions, Inc.
19-50131-gs DC Solar Distribution, Inc.
19-50135-gs DC Solar Freedom, Inc.

Adversary Case No.: 21-05072-gs

**MOTION TO WITHDRAW
BANKRUPTCY REFERENCE**

JURY TRIAL DEMANDED

**RELIEF IS SOUGHT FROM A UNITED
STATES DISTRICT JUDGE**

Hearing Date: TBD
Hearing Time: TBD
Estimated Time for hearing: TBD

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1 **I. INTRODUCTION**

2 Defendant Nixon Peabody LLP submits this motion under 28 U.S.C. § 157(d) to withdraw
 3 reference of an adversary proceeding. Courts in this district and circuit regularly withdraw
 4 bankruptcy references at the pre-trial stage where, as here, the claims that predominate arise
 5 under state law and require a jury trial. Here, the Bankruptcy Court cannot enter final judgment
 6 or conduct a jury trial on six of the Trustee's eight claims—including the common law claims that
 7 represent over 99% of the damages the Trustee seeks, and which comprise the overwhelming
 8 majority of the factual allegations in the complaint. Thus, all factors for permissive withdrawal of
 9 a bankruptcy reference support granting Nixon Peabody's motion.

10 *First*, considerations of judicial efficiency favor withdrawal. The Bankruptcy Court may
 11 neither enter a final judgment nor preside over a jury trial on the predominant state-law claims. A
 12 District Court is thus better positioned to manage pre-trial matters that will inevitably shape any
 13 potential trial. Moreover, the allegations in the Trustee's complaint encompass conduct far
 14 broader than the bankruptcy petitions; the bankruptcy court's prior knowledge regarding DC
 15 Solar's assets and bankruptcy petition will have limited value in this matter, which spans eight
 16 years of pre-petition conduct and claims and defenses arising under California law that are
 17 currently pending before another District Court. *Second*, withdrawing the bankruptcy reference
 18 would conserve costs and avoid delay. Costs would be saved if the pre-trial matters on non-core
 19 matters were consolidated in one forum, rather than bifurcated, avoiding unnecessary appeals to
 20 the District Court. Withdrawal would not create any delay because the Bankruptcy Court has not
 21 conducted any pre-trial proceedings. *Third*, withdrawing the bankruptcy reference would not
 22 interfere with administration of the bankruptcy estate, as the core claims are limited and Nixon
 23 Peabody consents to the bankruptcy court's enforcement of any potential judgment that would
 24 impact the bankruptcy plan. *Fourth*, withdrawal does not present a forum-shopping problem
 25 because only a District Court may enter final judgment, including a jury verdict, on the
 26 predominant claims and an appropriate District Court venue already exists.

27 Ultimately, as also set forth in Nixon Peabody's contemporaneously filed motion to
 28 transfer, this case should be heard in the Eastern District of California, where two highly similar

1 civil suits—as well as the many criminal prosecutions—arising out of DC Solar’s fraud are
 2 currently being litigated, including a case brought by the other party that Nixon Peabody
 3 represented in these same transactions along with DC Solar. In every relevant investment
 4 transaction involving DC Solar, Nixon Peabody’s limited scope of representation as tax counsel
 5 involved only two, related parties: DC Solar and the managing member of the particular
 6 investment fund. Nixon Peabody is already litigating in the Eastern District of California against
 7 the managing member, Solarmore Management (“Solarmore”), in a case that raises substantially
 8 all of the same facts and claims—and identical underlying transactions—as those set forth in the
 9 Trustee’s complaint. In another related case in the Eastern District of California, Solarmore also
 10 brought suit against DC Solar’s bankruptcy estate and over 40 other advisors to and entities
 11 related to DC Solar. Through all of this litigation arising from DC Solar’s Ponzi scheme, the
 12 Eastern District has developed significant subject-matter expertise in DC Solar’s underlying
 13 misconduct and the role that professional advisors, including—but not limited to—Nixon
 14 Peabody did (and did not) play in DC Solar’s fraud. Concentrating litigation there avoids the risk
 15 of inconsistent judgments—a risk that is more than theoretical, given the important legal
 16 questions surrounding duty, privilege, knowledge, causation, and *in pari delicto* that will be
 17 litigated in each of these actions. And the court in the Eastern District of California, as an Article
 18 III court, is empowered to oversee this Adversary Proceeding in a manner that the Bankruptcy
 19 Court is not. This matter should thus be transferred, and its reference withdrawn.¹

20 II. BACKGROUND

21 A. DC Solar’s Ponzi Scheme collapses.

22 DC Solar and its related entities (“DC Solar”) were founded around 2009, and its business
 23

24 ¹ Because this is fundamentally an Eastern District of California case, Nixon Peabody
 25 respectfully suggests that the transfer motion be decided first. The transferee court can then
 26 consider the motion to withdraw the reference if necessary. Nixon Peabody brings this motion
 27 now, however, to comply with L.R. 5011(b). This motion is timely under that rule and the
 28 stipulated order extending the briefing period. Order on Stip. To Extend Deadline for Nixon
 Peabody LLP to Respond to Compl., Dkt. No. 11 (entered Nov. 22, 2021).

1 model entailed creating investment funds to sell mobile solar generators to investors, who would
 2 receive substantial tax benefits. *See* Adversary Complaint ¶¶ 1–2, 10, 16 (“Compl.”), Dkt. No. 1.
 3 DC Solar would then lease the generators from the investment funds and to third parties, like
 4 arenas and concert venues, from whom DC Solar would collect lease payments. *Id.* ¶¶ 16–17.
 5 DC Solar retained Nixon Peabody for the limited purpose of providing an opinion explaining the
 6 tax consequence for investors. *Id.* ¶¶ 50, 106.

7 DC Solar’s scheme collapsed in December 2018 when the FBI raided the company’s
 8 headquarters. *Id.* ¶ 39. Most high-ranking DC Solar employees—including the owners, Jeff and
 9 Paulette Carpooff—have since pleaded guilty to wire fraud, money laundering, and similar charges
 10 and are currently being sentenced. *See, e.g.*, Ex. A (Carpoff Plea Agreement, *United States v. Jeff*
 11 *Carpoff*, No. 2:20-cr-00017-JAM (E.D. Cal. filed Jan. 22, 2020), Dkt. No. 10).² The Carpooffs
 12 admitted in their plea agreements that they “operated DC Solar as a Ponzi-like scheme” and
 13 “knowingly misrepresented the existence of lease revenue from third parties.” *Id.* at 23. They
 14 further acknowledged that “[o]ver 90% of the money Distribution claimed as lease revenue . . .
 15 was actually derived from transfers of cash contributed to Solutions by later investors in tax-
 16 equity and other transactions. . . . Thus, DC Solar merely paid obligations due to older investors
 17 with money raised from those investors and later investors.” *Id.*

18 **B. DC Solar’s bankruptcy and the appointment of the Trustee.**

19 Shortly after the FBI raid, the DC Solar entities filed for bankruptcy in this Court. Compl.
 20 ¶ 42. After the cases were converted to Chapter 7 petitions, the Trustee was appointed and
 21 stepped into the shoes of the Debtor corporations. *See id.* ¶ 43; *In re Double Jump, Inc.*, No. 19-
 22 50102-gs (Bankr. D. Nev. Filed Jan. 30, 2019), Dkt. Nos. 390, 439. Nixon Peabody then filed a
 23 proof of claim against DC Solar Solutions’ estate based on legal services that Nixon Peabody
 24 provided prior to the FBI raid. *See* Ex. B (March 4, 2019 Nixon Peabody Proof of Claim 34-1).
 25 Nixon Peabody has since moved to withdraw the claim under Fed. R. Bankr. P. 3006. *See* Dkt.

26 ² Pursuant to Fed. R. Evid. 201, courts “may take judicial notice of court filings and other matters
 27 of public record.” *Mahoney v. Sessions*, 871 F.3d 873, 877 (9th Cir. 2017). Nixon Peabody
 28 requests that the Court take judicial notice of the filings and pleadings attached to this motion and
 otherwise cited herein.

1 No. 2985, *In re Double Jump, Inc.*, No. 19-50102-gs (Bankr. D. Nev. filed Nov. 19, 2021).
 2 Separately—and unrelated to the proof of claim—Nixon Peabody produced its entire DC Solar
 3 case file to the Trustee in 2019 and firm partner Forrest Milder sat for a Rule 2004 examination
 4 the following year. Declaration of Eric MacMichael (“MacMichael Decl.”) ¶¶ 2–3.

5 **C. The Trustee’s adversary proceeding against Nixon Peabody.**

6 The Trustee filed the Adversary Complaint against Nixon Peabody on October 25, 2021,
 7 alleging that the law firm somehow should have prevented DC Solar’s criminal fraud. The
 8 Trustee asserts four directly non-core, state-law claims—legal malpractice, breach of fiduciary
 9 duty, conspiracy, and aiding and abetting breach of fiduciary duty. The premise of these claims is
 10 remarkable: relying on tort law, the Trustee seeks hundreds of millions of dollars in damages for a
 11 fraud that DC Solar itself committed, on the theory that Nixon Peabody—who was hired for the
 12 limited purpose of providing tax advice—failed to investigate and prevent DC Solar’s own
 13 criminal misconduct. Ignoring the limited role Nixon Peabody had in these transactions, the
 14 Adversary Complaint alleges that Nixon breached its professional duties, thereby allowing
 15 Carpoff to encumber his own company with “obligations and liabilities, . . . misuse [] company
 16 assets, . . . loot[] company assets, . . . aggravat[e] company insolvency and wrongfully prolong[]
 17 its life.” Compl. ¶¶ 260, 273. The scope of the tortious misconduct alleged is vast: The
 18 Adversary Complaint contends that Nixon Peabody is implicated in “[a]ll (or nearly all)” of the
 19 over thirty investment deals, amounting to “more than \$2 billion.” *Id.* ¶¶ 3, 122–24. The Trustee
 20 alleges that Nixon Peabody is jointly and severally liable for *all* of the damages DC Solar caused
 21 on the theory that it conspired with Carpoff to perpetrate the DC Solar Ponzi scheme by “staying
 22 silent.” *Id.* ¶¶ 301, 304.

23 The trustee’s remaining claims—disallowance, fraudulent transfer, and avoidance—
 24 amount to approximately \$100,000 and do not rely on nearly any of the allegations otherwise
 25 made in the Trustee’s 53-page complaint. In the Adversary Complaint, the Trustee “consents to
 26 the entry of final orders and judgments by [the Bankruptcy Court].” Compl. ¶¶ 13–14. The
 27 Adversary Proceeding has not moved past the pleading stage. Pursuant to Fed. R. Bankr.
 28 P. 7008(a), Nixon Peabody does not consent to the entry of final orders or judgments by the

1 bankruptcy judge if it is determined that the bankruptcy judge, absent consent of the parties,
 2 cannot enter final orders or judgments on any or all claims consistent with Article III of the
 3 United States Constitution.³

4 **D. Related actions pending in the Eastern District of California**

5 The Ponzi scheme perpetrated by DC Solar has thus far resulted in seven federal criminal
 6 prosecutions, all in the United States District Court for the Eastern District of California before
 7 Judge John A. Mendez.⁴ Each defendant has pleaded guilty to crimes relating to their role in
 8 perpetrating the DC Solar Ponzi scheme, and Judge Mendez is in the process of sentencing those
 9 defendants for their pre-petition conduct in perpetrating DC Solar's fraud.⁵ Judge Mendez has
 10 also presided over a number of civil actions for forfeiture brought by the United States and the
 11 Securities and Exchange Commission against the owners of DC Solar.⁶

12 In addition to those criminal actions, Judge Mendez is presiding over two civil actions that
 13 are strikingly similar to this Adversary Proceeding and involve these parties. The managing
 14 member of some of the DC Solar investment funds, Solarmore Management ("Solarmore"), has
 15

16 ³ Nixon Peabody's demand for a jury trial on all eligible claims, including the state law and
 17 fraudulent transfer claims, will be filed contemporaneously with this motion.

18 ⁴ See *United States v. Jeff Carpooff*, 20-cr-00017-JAM-1 (E.D. Cal. filed Jan. 22, 2020); *United*
19 States v. Paulette Carpooff, 20-cr-00018-JAM-1 (E.D. Cal. filed Jan. 22, 2020); *United States v.*
Roach, 19-cr-00182-JAM-1 (E.D. Cal. filed Oct. 21, 2019); *United States v. Bayliss*, 19-cr-
 20 00182-JAM-2 (E.D. Cal. filed Oct. 21, 2019); *United States v. Karmann*, 19-cr-00222-JAM-1
 21 (E.D. Cal. filed Dec. 12, 2019); *United States v. Guidry*, 20-cr-00003-JAM-1 (E.D. Cal. filed Jan.
 22, 2020); *United States v. Hansen*, 20-cr-00016-JAM-1 (E.D. Cal. filed Jan. 21, 2020).

23 ⁵ *J. Carpooff*, 20-cr-00017-JAM-1, Dkt. No. 11; *P. Carpooff*, 20-cr-00018-JAM-1, Dkt. No. 11;
Roach, 19-cr-00182-JAM-1, Dkt. No. 8; *Bayliss*, 19-cr-00182-JAM-2, Dkt. No. 8; *Karmann*, 19-
 24 cr-00222-JAM-1 Dkt. No. 12; *Guidry*, 20-cr-00003-JAM-1, Dkt. No. 8; *Hansen*, 20-cr-00016-
 JAM-1, Dkt. No. 17.

25 ⁶ See, e.g. *SEC v. Carpooff*, No. 2:20-CV-00180- JAM-AC (E.D. Cal. filed Jan. 24, 2020); *United*
26 States v. 725 Main Street, Martinez, California, No. 2:19-CV-00247-JAM-DB (E.D. Cal. filed
 Feb. 8, 2019); *United States v. Approximately \$6,567,897.50 Seized from CTBC Bank, Account*
27 Number 380019196, No. 2:19-CV-00485-JAM-DB (E.D. Cal. filed Mar. 18, 2019); *United States*
v. 5383 Stonehurst Drive, Martinez, California, No. 2:19-CV-00636-JAM-DB (E.D. Cal. filed
 Apr. 15, 2019); *SEC v. Bayliss*, No. 2:19-CV-2140-JAM-DB (E.D. Cal. filed Oct. 22, 2019); and
SEC v. Karmann, No. 2:19-CV-2531-JAM-DB (E.D. Cal. filed Dec. 17, 2019).

sued Nixon Peabody and firm partner Forrest Milder on the same operative facts and many of the same claims regarding the exact same transactions that are at issue here. *See Ex. C, Solarmore II Complaint (Solarmore Mgmt. Svc., Inc. v. Nixon Peabody, LLP (“Solarmore II”), No. 2:20-cv-02446-JAM-DB, Dkt. No. 1-2 (E.D. Cal. filed Nov. 3, 2020) (Mendez, J.).* As here, Nixon Peabody’s former client, Solarmore, alleges that Nixon Peabody should have somehow uncovered and stopped DC Solar’s misconduct. *Id.* ¶¶ 137–163. And as here, Solarmore alleges claims under California tort law, including breach of fiduciary duty, malpractice, and misrepresentation. *Id.* ¶¶ 111–121; 137–154.

Additionally, in a separate (and earlier-filed) case likewise pending before Judge Mendez, Solarmore sued the Trustee and over a dozen of DC Solar’s other professional advisors. *See Ex. D, Solarmore I Complaint (Solarmore Mgmt. Servs., Inc. v. Bankr. Est. of DC Solar Sols., Inc. (“Solarmore I”), No. 2:19-cv-02544-JAM-DB (E.D. Cal. filed Dec. 17, 2019) (Mendez, J.), Dkt. No. 1).* Although the Trustee is no longer named in the amended complaint, she consented to that suit being filed outside of bankruptcy court; given the existence of the many criminal and SEC matters, the case was filed in the Eastern District of California and also assigned to Judge Mendez. Discovery in *Solarmore I* and *Solarmore II* will overlap substantially with discovery in this case given the overlap in the underlying transactions, allegations, relevant witnesses and document custodians.

III. ARGUMENT

This Court should exercise its discretion to withdraw the bankruptcy reference. Upon timely motion, this Court “may withdraw, in whole . . . any case or proceeding referred . . . for cause shown.” 28 U.S.C. § 157(d). To determine if cause exists, courts look principally to whether the claims asserted are core or non-core. *See, e.g., In re Zante, Inc.*, No. 3:10-CV-00231-RCJ-RAM, 2010 WL 5477768, at *6 (D. Nev. Dec. 29, 2010). Where non-core claims predominate, withdrawal of the reference is favored. *Id.* Courts also consider *inter alia* “[1] the efficient use of judicial resources, [2] delay and costs to the parties, [3] uniformity of bankruptcy administration, [4] the prevention of forum shopping, and [5] other related factors.” *Sec. Farms v. Int’l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d 999, 1008

1 (9th Cir. 1997). The movant bears the burden of persuasion. *In re Solano*, No. CV 17-2158
 2 FMO, 2017 WL 8180597, at *2 (C.D. Cal. June 19, 2017). Here, all factors favor withdrawal of
 3 the reference.

4 **A. Claims That Are Non-Core and Otherwise Not Finally Decidable by a**
5 Bankruptcy Court Predominate.

6 The central inquiry on a motion to withdraw a reference is whether the bankruptcy court
 7 can preside over an eventual trial and render a final judgment. Where claims that must be heard
 8 by an Article III tribunal predominate, courts are particularly willing to grant withdrawal. Just so
 9 here.

10 **1. The claims at the heart of the Trustee’s Complaint are non-core.**

11 A “core proceeding is one that invokes a substantive right provided by title 11 or a
 12 proceeding that, by its nature, could arise only in the context of a bankruptcy case.” *Battle*
13 Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124, 1131 (9th Cir. 2010) (quotations and
 14 citation omitted). Core proceedings include “matters concerning the administration of the estate”
 15 and “other proceedings affecting the liquidation of the assets of the estate or the adjustment of the
 16 debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful
 17 death claims.” 28 U.S.C. § 157(b)(2)(A), (O). By contrast, “[i]f the proceeding does not invoke a
 18 substantive right created by the federal bankruptcy law and is one that could exist outside of
 19 bankruptcy[,] it is not a core proceeding.” *In re Eastport Assocs.*, 935 F.2d 1071, 1076 (9th Cir.
 20 1991) (quoting *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)); *see also Schultze v. Chandler*, 765
 21 F.3d 945, 948 (9th Cir. 2014) (holding that the proper inquiry is whether the claims would have
 22 any “existence outside of the bankruptcy”).

23 Four claims—one for legal malpractice (Count I) and three for breach of fiduciary duty
 24 (Counts II–IV)—dominate the Trustee’s Adversary Complaint and are the sole basis for the
 25 Trustee’s request for “hundreds of millions of dollars in damages.” Compl. at 2. The factual
 26 allegations underlying these four claims comprise 45 pages of the 53-page Complaint. These four
 27 central claims are all indisputably non-core. *See, e.g., In re ACI-HDT Supply Co.*, 205 B.R. 231,
 28 237 (B.A.P. 9th Cir. 1997); *Shengdatech Liquidating Tr. v. Hansen, Barnett, & Maxwell, P.C.*,

1 No. 3:13-CV-00563-RCJ, 2013 WL 6408518 at *2 (D. Nev. Nov. 26, 2013) (claims for
 2 professional negligence and malpractice focused on pre-petition advice were not core claims).
 3 Not only are these legal claims typically considered non-core claims, the factual allegations
 4 underlying the claims occurred years before the DC Solar entities filed for bankruptcy and are
 5 unrelated to administration of the estate. *See ACI-HDT*, 205 B.R. at 237 (distinguishing between
 6 malpractice adversary proceedings concerning post-petition conduct, which may be core, and pre-
 7 petition conduct, which is likely non-core); *see also In re 610 W. 142 Owners Corp.*, 219 B.R.
 8 363, 370 (Bankr. S.D.N.Y. 1998) (“Here, these state law causes of action for breach of fiduciary
 9 duty and negligence arose prepetition. They do not involve the application of bankruptcy law and
 10 are therefore non-core.”). All four claims also carry a jury trial right and must be decided by an
 11 Article III court.

12 The Trustee’s remaining claims—disallowance (Count VIII), avoidance (Count VII), and
 13 fraudulent transfer (Counts V–VI)—are ancillary at best. The proof of claim that gives rise to the
 14 disallowance claim totals just over \$100,000 and pales in comparison to the damages the Trustee
 15 seeks for her non-core, state-law claims. Moreover, the Trustee’s avoidance and fraudulent
 16 transfer claims are plagued by irremediable defects that underscore the claims’ lack of
 17 predominance. *First*, as Nixon Peabody will explain in its forthcoming motion to dismiss, the
 18 Trustee does not have the standing to pursue most of these claims. The transfers underlying these
 19 three claims were “for the payment of legal fees,” Compl. ¶¶ 310, 317; however, as the Trustee is
 20 aware, DC Solar did not directly pay for most of these services and thus cannot recover for
 21 payments that it did not make. *See* MacMichael Decl. ¶ 2; *see In re Summers*, 320 B.R. 630,
 22 648–49 (Bankr. E.D. Mich. 2005) (holding that no cause of action exists under 11 U.S.C. § 548
 23 for fraudulent transfer of assets that never belonged to the debtor); *cf. In re Zante, Inc.*, 2010 WL
 24 5477768, at *6 (noting in predominance analysis that the one claim that arises under the
 25 bankruptcy code is invalid). *Second*, even if the Trustee has standing to pursue the avoidance and
 26 fraudulent transfer claims, these claims will be minuscule compared to the non-core claims
 27 discussed above, for which the Trustee seeks damages that amount to over ***one hundred times***
 28 any arguably core claims.

2. Two of the trustee's remaining claims must also be tried before an Article III court, weighing in favor of withdrawal.

Not only are the four claims that will occupy the vast majority of the parties' efforts non-core, but the Trustee's two fraudulent transfer claims are akin to non-core claims. In *Stern v. Marshall*, the Supreme Court held that Article III prohibits bankruptcy courts from entering final judgements on certain core claims, even where Congress has authorized the bankruptcy court to hear those claims. 564 U.S. 462, 482 (2011). For such claims—commonly referred to as “*Stern* claims”—the Bankruptcy Court can only issue proposed findings, which are subject to *de novo* review by the District Court. See *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 533, 565–66 (9th Cir. 2012), *aff’d sub nom. Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014). The Ninth Circuit has held that *Stern* applies to both state and federal claims for fraudulent transfer, prohibiting bankruptcy courts from entering final judgment on such claims without the consent of all parties. See *id.*, 702 F.3d at 561–62. Thus, without Nixon Peabody’s consent—which it has not granted—these claims are functionally the same as the non-core claims. They too confer a jury trial right and are subject to *de novo* review by the District Court, strongly supporting withdrawal of the reference.

3. The Trustee's disallowance claim is moot.

Nixon Peabody has moved to withdraw its proof of claim against DC Solar Solutions. If the Bankruptcy Court allows Nixon Peabody to withdraw its proof of claim, the Trustee's disallowance claim will be moot; even if the Bankruptcy Court does not rule on Nixon Peabody's motion immediately, the act of filing the motion has practically mooted those claims in the Adversary Proceeding already. Nixon Peabody has neither litigated nor conducted discovery regarding its proof of claim, nor does Nixon Peabody intend to pursue it further.

* * *

As evidenced by the Complaint itself, the crux of the Trustee’s allegations involves issues of (California) common law, which constitutionally belong before a jury and thus an Article III court. Four of the Trustee’s seven live claims are decidedly non-core and *six* must be tried to an Article III court. That “weighs very heavily in favor of withdrawal.” *In re Zante, Inc.*, 2010 WL

1 5477768, at *6.

2 **B. Each factor concerning withdrawal of the bankruptcy reference favors**
 3 **granting Nixon Peabody' motion.**

4 The remaining factors courts consider on a motion to withdraw the reference likewise
 5 favor Nixon Peabody.

6 **1. Judicial Efficiency**

7 Judicial efficiency strongly supports withdrawing the bankruptcy reference. This
 8 Adversary Case has only just been filed; Nixon Peabody has not yet responded to the Complaint;
 9 and the Bankruptcy Court has not yet been required to familiarize itself with the California-state-
 10 law professional malpractice and breach of fiduciary duty claims that dominate the case or the *in*
 11 *pari delicto* defense that hangs over them. *See, e.g., In re Align Strategic Partners LLC*, No. 16-
 12 35702, 2019 WL 2524938, at *3 (Bankr. S.D. Tex. Mar. 5, 2019) (finding withdrawal warranted
 13 where Bankruptcy “Court has not gained any in-depth familiarity with the underlying facts in the
 14 Adversary Proceeding”). To be sure, the Bankruptcy Court is familiar with the DC Solar entities
 15 and their various bankruptcy petitions. But that does not preserve judicial resources here, because
 16 the conduct underlying *this* case occurred entirely pre-petition and has not been raised in any
 17 significant detail in other motions or pleadings filed in the Bankruptcy Court.

18 Moreover, efficiency is better served when the parties need not resort to District Court
 19 review of the Bankruptcy Court’s proposed findings of fact and conclusions of law. Indeed, it
 20 would be a poor use of resources for both the Bankruptcy Court and the District Court if Nixon
 21 Peabody’s Rule 12(b)(6) motion and any possible future Rule 56 motion would need to be
 22 considered anew by both courts. 28 U.S.C. § 157(c)(1); *see, e.g., In re Shoe Pavilion, Inc.*, No.
 23 2:13-CV-01245- CJC, 2013 WL 12113232, at *1 (C.D. Cal. May 30, 2013) (adopting bankruptcy
 24 court’s recommendation to grant defendant’s motions for summary judgment). A court within
 25 this district ruled in a similar case involving pre-petition malpractice claims that “judicial
 26 efficiency weighs in favor of withdrawal to this Court since the District Court would have to
 27 review all dispositive recommendations as to non-core issues de novo, increasing costs and
 28 causing delay.” *Shengdatech*, 2013 WL 6408518, at *2; *Sec. Farms*, 124 F.3d at 1008 (district

court appropriately withdraws a bankruptcy reference when “non-core issues predominate”). Similarly, because any jury trial must take place in District Court, judicial efficiency is best served by having the District Court conduct pre-trial proceedings. “[S]everal courts have concluded that where,” as here, “a jury trial is required and the parties refuse to consent to bankruptcy jurisdiction, withdrawal of the case to the district court is appropriate.” *In re Cinematronics, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990). When a “District Court Judge must eventually preside over the jury trial in this matter, it would constitute a **tremendous waste of judicial resources** to permit the bankruptcy judge to continue to maintain jurisdiction over the issues presented in this litigation.” *In re Transcon Lines*, 121 B.R. 837, 838 (C.D. Cal. 1990) (emphasis added); *Nelson v. XL America, Inc. (In re Ameri-Dream Realty, LLC)*, No. 2:16-cv-00060-JAD-GWF, 2016 U.S. Dist. LEXIS 157788, at *3 (D. Nev. Nov. 14, 2016) (concluding that “[e]ither way, this case is coming back” to the district court, and denying withdrawal “would duplicate [the bankruptcy court’s] efforts”).

Indeed, as set forth in Nixon Peabody’s contemporaneously filed transfer motion, the best use of resources would be for this case to be heard in the Eastern District of California, where two strikingly similar cases are already pending.⁷ **First**, as to the substance, there’s no good reason for two different courts to consider the exact same facts and underlying transactions, and to decide the same legal issues—such as the scope of Nixon Peabody’s duty to its clients and its *in pari delicto* defense against DC Solar—especially when there is a chance that the two courts could reach different conclusions on the same question. The issues that will arise in this Adversary Case have been at the heart of the numerous criminal and civil matters pending in the

⁷ This motion has been filed contemporaneously with a motion to transfer the case to the United States District Court for the Eastern District of California. Should this case be transferred to the Eastern District, Nixon Peabody will immediately file a Notice of Related Case, pursuant to Eastern District of California Local Rule 123, to relate this case to the pending actions in the Eastern District, which will ensure that the case is coordinated with the pending DC Solar cases. To the extent there are any post-trial collection issues, Nixon Peabody agrees that those limited concerns—which are unlikely to arise—could be litigated before the Bankruptcy Court in the District of Nevada, a procedural condition on which the Trustee already predicated her consent to the filing of *Solarmore I* in the Eastern District of California.

1 Eastern District of California.

2 **Second**, discovery in the Eastern District of California would increase judicial efficiency,
 3 allow for coordination between all relevant parties, and avoid duplicating efforts. The Trustee
 4 will invariably argue that it has filed over 40 adversary proceedings in this Court and this case is
 5 no different. And the Bankruptcy Court here may want to conduct discovery in 180 days, as
 6 Local Rule 7026(b) recommends. But the Trustee's Adversary Complaint against Nixon Peabody
 7 is *entirely unlike* the conventional, cookie-cutter complaints in her other adversary proceedings,
 8 which generally allege fraudulent transfer claims for which six months of discovery would be
 9 more than enough. The Trustee's state-law claims and allegations here are far broader: The
 10 Adversary Complaint spans almost a decade of conduct, alleging that Nixon Peabody either
 11 assisted, aided, abetted, or failed to detect the Carpoffs' fraudulent conduct in over 35
 12 transactions involving at least nine different investors. Not only will the *Solarmore* cases involve
 13 the exact same facts and underlying transactions, as discussed above, but they will require
 14 coordinating discovery with the same 40+ parties to limit discovery disputes and repetitive
 15 depositions. The issues at the core of this Adversary Complaint would be difficult to resolve with
 16 only 180 days of discovery, and such a schedule would effectively prohibit coordination of
 17 discovery with the *Solarmore* cases and require duplicative discovery. Moreover, it would be far
 18 more efficient for the *same* court to manage discovery—and the inevitable discovery disputes—in
 19 these similar actions, instead of requiring this court to take a sliver of the *Solarmore* cases and
 20 repeat the entire discovery process here.

21 Nixon Peabody acknowledges that courts within this district have reached different
 22 decisions regarding whether to withdraw the bankruptcy reference in the early stages or just
 23 before trial. Many of the cases denying an early withdrawal of the reference, however, are easily
 24 distinguishable from this Adversary Complaint for three reasons. **First**, many of those cases
 25 involve only fraudulent transfer claims, which may “routinely arise in the context of bankruptcy,
 26 and are often integrally tied to core proceedings.” *Rosenberg v. Harvey A. Bookstein*, 479 B.R.
 27 584, 590 (D. Nev. 2012); *see also Krohn v. Stipp (In re Plise)*, No. 2:13-cv-00169-JAD-PAL,
 28 2015 WL 4997296 (D. Nev. Aug. 19, 2015). Here, not only are there significant non-core claims

1 other than the fraudulent transfer claims, the non-core claims do not predominate and are not
 2 integrally tied to the core proceedings. **Second**, cases denying withdrawal often have virtually
 3 identical adversary complaints already pending before the bankruptcy court, frequently for
 4 fraudulent transfer claims. Here, the Trustee's Adversary Complaint against Nixon Peabody is
 5 unique in its individualized, tort-based claims and allegations, which comprise almost the entirety
 6 of the Complaint. **Third**, cases denying withdrawal until trial frequently conclude that the
 7 bankruptcy court is "the court most familiar with the parties and issues." *Bagley v. Locke Lord*
 8 *LLP (In re Desert Capital REIT, Inc.)*, No. 2:13-cv-01114-JAD, 2014 U.S. Dist. LEXIS 28949, at
 9 *8 (D. Nev. March 6, 2014); *see also* Ex. E (Order Denying Motion to Withdraw Reference,
 10 *Melech v. Polhill (In re American Pacific Financial Corp.)*, No. 2:13-cv-01113-JCM (PAL) (D.
 11 Nev. Feb. 5, 2014), Dkt. No. 34 (same)). Here, the Eastern District of California—not the
 12 bankruptcy court—is "the court most familiar" with the parties, the claims, and the underlying
 13 pre-petition conduct at issue. The very same claims and defenses will be litigated before that
 14 court, which already has familiarity with many of the criminal and civil cases related to DC
 15 Solar's downfall.

16 The facts here are far more analogous to cases within this district that have withdrawn the
 17 bankruptcy reference at an early stage. *See Shengdatech*, 2013 WL 6408518, at *2–3
 18 (withdrawing reference where non-core issues predominated and adjudication would likely not
 19 impact the bankruptcy administration); *see also Off. Comm.. of Unsecured Creditors v. Marini (In*
 20 *re Windspire Energy, Inc.)*, No. 3:13-cv-10-RCJ-WGC, 2013 U.S. Dist. LEXIS 46727, at *2–3
 21 (D. Nev. April 1, 2013) (withdrawing reference in case involving breach of fiduciary duty and
 22 fraudulent transfer because of judicial economy and on recommendation of the bankruptcy
 23 judge); *Nelson*, 2016 U.S. Dist. LEXIS 157788 (withdrawing reference to avoid duplicating
 24 efforts); *see also* Ex. F (*USACM Liquidating Trust v. Compass USA SPE (In re USA Commercial*
 25 *Mortgage Co.)*, No. 2:14-cv-00455-RCJ-PAL (D. Nev. May 28, 2014), Dkt. No. 4 (withdrawing
 26 reference on recommendation of the bankruptcy judge because the parties would be litigating the
 27 same issues related to another action pending before the District Court)). Unlike the Trustee's
 28 other adversary complaints, this Complaint is different in that it is focused almost entirely on

1 individualized, California tort claims that will eventually end up before a District Court. There is
 2 no efficiency in having the bankruptcy court adjudicate the very same claims and issues that are
 3 already before the Eastern District of California.

4 Judicial efficiency would best be served by withdrawing the bankruptcy reference and
 5 transferring this case.

6 **2. Cost and Delay**

7 For similar reasons, considerations of cost and delay also favor withdrawing the reference.
 8 The process of repeatedly submitting the Bankruptcy Court's proposed findings of fact and
 9 conclusions of law to the District Court for *de novo* review would impose significant costs and
 10 could cause repeated delays, neither of which is necessary here. *In re Addison*, 240 B.R. 47, 50
 11 (C.D. Cal. 1999) (granting withdrawal of reference because constant back-and-forth would cause
 12 unnecessary delay); *see also In re O'Hannesson*, No. 5:12-cv-04068 EJD, 2013 WL 655158, at *4
 13 (N.D. Cal. Feb. 21, 2013) ("[A]llowing pretrial matters to proceed in [District Court] . . . prevents
 14 delay and saves costs since the parties will have dealt with one court rather than two."). And
 15 withdrawal would not itself cause delay. The parties have not moved past the pleading stage, and
 16 the Bankruptcy Court has not taken any action on the merits of the complaint or scheduled any
 17 hearings. Thus, "withdrawal will prevent delay and added costs to the parties by placing the non-
 18 core claims in [the district court], which can render final judgment." *Everett v. Art Brand*
 19 *Studios, LLC*, 556 B.R. 437, 445 (N.D. Cal. 2016) (quoting *In re Rosales*, No. 13-cv-01316-LHK,
 20 2013 WL 5962007 at *7 (N.D. Cal. Nov. 7, 2013)).

21 **3. Administration of the bankruptcy estate**

22 Withdrawal would not harm the administration of the bankruptcy estate. *See In re*
 23 *Rosales*, 2013 WL 5962007, at *7. Here, however, Nixon Peabody has already moved for leave
 24 to withdraw its proof of claim, which it will no longer pursue; thus, the disallowance claim does
 25 not weigh heavily on this factor. And as discussed above, the Trustee's avoidance claim suffers
 26 from significant standing issues. Any argument that withdrawal of the reference would affect the
 27 administration of the bankruptcy estate must take into account the deficiencies of those two
 28 claims. Finally, even if withdrawal did result in slight disruption to the administration of the

1 bankruptcy estate, it “is outweighed by the efficiency that will result in withdrawing the Trustee’s
 2 non-core claims to this court.” *Everett*, 556 B.R. at 446.⁸

3 **4. Forum-shopping**

4 Forum shopping is not a concern here as only the District Court has the power to enter
 5 final judgment. Even if the Bankruptcy Court adjudicated the Trustee’s non-core claims, this
 6 Court would have to conduct *de novo* review and oversee a jury trial. *In re Cinematronics, Inc.*,
 7 916 F.2d at 1451. Moreover, as Nixon Peabody’s transfer motion shows, the courts should
 8 concentrate the suits and claims that go to the conduct of DC Solar’s professional advisors before
 9 a single court that has developed significant subject-matter expertise regarding such matters—in
 10 this case, the Eastern District of California. That’s not forum shopping: it’s a sensible allocation
 11 of the parties’ and the judiciary’s resources.

12 All factors therefore favor withdrawal, and this Court should exercise its discretion to
 13 withdraw the bankruptcy reference.

14 **IV. CONCLUSION**

15 For the foregoing reasons, this Court should withdraw the bankruptcy reference of the
 16 entire Adversary Proceeding.

26 ⁸ If this Court prefers to leave the two core claims—avoidance and disallowance—in Bankruptcy
 27 Court, the Court can sever the six non-core and *Stern* claims and withdraw the reference only as
 28 to those six claims. When “[u]niform administration of the bankruptcy estate is the sole factor
 that favors not withdrawing the reference,” courts have severed non-core claims and allowed only
 core claims to proceed before the Bankruptcy Court. *In re Rosales*, 2013 WL 5962007, at *7.

1 Dated: November 24, 2021

KEKER, VAN NEST & PETERS LLP

2
3 By: /s/ Elliot R. Peters
4 ELLIOT R. PETERS
ERIC H. MACMICHAEL

5 Dated: November 24, 2021

KAEMPFER CROWELL

6
7 By: /s/ Louis M. Bubala III
8 LOUIS M. BUBALA III

9 Attorneys for Defendant Nixon Peabody
10 LLP

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EXHIBIT A

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FILED
 JAN 24 2020
 CLERK, U.S. DISTRICT COURT
 EASTERN DISTRICT OF CALIFORNIA
 BY *[Signature]*
 DEPUTY CLERK

7 IN THE UNITED STATES DISTRICT COURT
 8
 9 EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,
 11 Plaintiff,
 12 v.
 13 JEFF CARPOFF,
 14 Defendant.

CASE NO. *2:20-cr-17 JAM*

PLEA AGREEMENT

DATE: JANUARY 24, 2020

TIME: 10:00 AM

COURT: HON. JOHN A. MENDEZ

I. INTRODUCTIONA. Scope of Agreement.

The Information in this case charges the defendant with violations of Title 18, United States Code, Section 1349—Conspiracy to Commit Wire Fraud (“Count One”), and Title 18, United States Code, Section 1957(a)— Money Laundering (“Count Two”). This document contains the complete plea agreement between the United States Attorney’s Office for the Eastern District of California (the “government”) and the defendant regarding this case. This Plea Agreement is limited to the United States Attorney’s Office for the Eastern District of California and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities.

B. Court Not a Party.

The Court is not a party to this Plea Agreement. Sentencing is a matter solely within the discretion of the Court, and the Court may take into consideration any and all facts and circumstances

1 concerning the criminal activities of the defendant, including activities which may not have been
2 charged in the Information. The Court is under no obligation to accept any recommendations made by
3 the government, and the Court may in its discretion impose any sentence it deems appropriate up to and
4 including the statutory maximum stated in this Plea Agreement.

5 If the Court should impose any sentence up to the maximum established by the statutes, the
6 defendant cannot, for that reason alone, withdraw his guilty plea, and he will remain bound to fulfill all
7 of the obligations under this Plea Agreement. The defendant understands that neither the prosecutor,
8 defense counsel, nor the Court can make a binding prediction or promise regarding the sentence he will
9 receive.

10 **II. DEFENDANT'S OBLIGATIONS**

11 **A. Guilty Plea.**

12 The defendant will plead guilty to violating Title 18, United States Code, Section 1349—
13 Conspiracy to Commit Wire Fraud (“Count One”), and Title 18, United States Code, Section 1957(a)—
14 Money Laundering (“Count Two”). The defendant agrees that he is in fact guilty of those charges and
15 that the facts set forth in the Factual Basis for Plea attached hereto as Exhibit A are accurate.

16 The defendant agrees that this Plea Agreement will be filed with the Court and become a part of
17 the record of the case. The defendant understands and agrees that he will not be allowed to withdraw his
18 plea should the Court not follow the government’s sentencing recommendations.

19 The defendant agrees that the statements made by him in signing this Agreement, including the
20 factual admissions set forth in the factual basis and those made on January 17, 2020, during the process
21 of negotiating this Agreement, shall be admissible and useable against the defendant by the United
22 States in any subsequent criminal or civil proceedings, even if the defendant fails to enter a guilty plea
23 pursuant to this Agreement. The defendant waives any rights under Fed. R. Crim. P. 11(f) and Fed. R.
24 Evid. 410, to the extent that these rules are inconsistent with this paragraph or with this Agreement
25 generally.

26 **1. Waiver of Indictment.**

27 The defendant acknowledges that under the United States Constitution he is entitled to be
28 indicted by a grand jury on the charges to which he is pleading guilty and that pursuant to Fed. R. Crim.

1 P. 7(b) he agrees to waive any and all rights he has to being prosecuted by way of Indictment to the
2 charges set forth in the Information. The defendant agrees that at a time set by the Court, he will sign a
3 written waiver of prosecution by Indictment and consent to proceed by Information rather than by
4 Indictment.

5 1. Package Agreement.

6 The defendant acknowledges and understands that the plea offer made to him here by the
7 government is a "package offer." That is, the defendant understands that the offer made to him is
8 conditioned on co-defendant Paulette Carpooff pleading guilty according to the terms of her respective
9 plea offer. The defendant understands that if this co-defendant declines, refuses or fails to plead guilty
10 according to her respective offer, then, at the option of the government, the defendant will not be
11 allowed to enter a plea of guilty to the offer made to him by the government. Additionally, if co-
12 defendant Paulette Carpooff fails or refuses to enter her plea according to her respective offer and the
13 defendant has already entered his plea, then this Plea Agreement is voidable at the option of the
14 government. Should that occur, in its sole discretion, the government has the ability to withdraw from
15 the Plea Agreement with the defendant and pursue the original charges as to this defendant. However,
16 the defendant's waiver of his rights under Rule 11(f) and Fed. R. Evid. 410, as set forth in Section II.A
17 herein, will not operate.

18 Recognizing that this is a package offer, the defendant confirms that he has not been threatened,
19 pressured, or coerced by any other person, including the co-defendant, to enter into this plea agreement.
20 The defendant also confirms that he enters into this plea agreement voluntarily because he is in fact
21 guilty of the offenses to which he is pleading guilty.

22 B. Restitution.

23 The Mandatory Victim Restitution Act requires the Court to order restitution to the victims of
24 certain offenses. The defendant agrees that his conduct is governed by the Mandatory Restitution Act
25 pursuant to 18 U.S.C. § 3663A(c)(1)(A)(ii) and agrees to pay the full amount of restitution to all victims
26 affected by this offense, including, but not limited to, the victims covered in the factual basis, victims
27 covered in those counts to be dismissed as part of the Plea Agreement pursuant to 18 U.S.C. §
28 3663A(a)(3), and other victims as a result of the defendant's conduct for the offenses charged from the

1 periods through in or about March 2011 and in or about December 2018. The amount of restitution has
2 not yet been determined but will likely be between approximately \$800 million and \$1.6 billion.

3 Restitution payments shall be by cashier's or certified check made payable to the Clerk of the
4 Court.

5 The defendant further agrees that he will not seek to discharge any restitution obligation or any
6 part of such obligation in any bankruptcy proceeding.

7 C. Fine.

8 The defendant reserves the right to argue to Probation and at sentencing that he is unable to pay a
9 fine, and that no fine should be imposed. The defendant understands that it is his burden to affirmatively
10 prove that he is unable to pay a fine, and agrees to provide a financial statement under penalty of perjury
11 to the Probation Officer and the government in advance of the issuance of the draft Presentence
12 Investigation Report, along with supporting documentation. The government retains the right to oppose
13 the waiver of a fine. If the Court imposes a fine, the defendant agrees to pay such fine if and as ordered
14 by the Court, up to the statutory maximum fine for the defendant's offense.

15 D. Special Assessment.

16 The defendant agrees to pay a total special assessment of \$200 (comprised of \$100 per count of
17 conviction) at the time of sentencing by delivering a check or money order payable to the United States
18 District Court to the United States Probation Office immediately before the sentencing hearing. The
19 defendant understands that this Plea Agreement is voidable at the option of the government if he fails to
20 pay the assessment prior to that hearing.

21 E. Violation of Plea Agreement by Defendant/Withdrawal of Plea.

22 If the defendant violates this Plea Agreement in any way, withdraws his plea, or tries to
23 withdraw his plea, this Plea Agreement is voidable at the option of the government. If the government
24 elects to void the Agreement based on the defendant's violation, the government will no longer be
25 bound by its representations to the defendant concerning the limits on criminal prosecution and
26 sentencing as set forth herein. A defendant violates this Plea Agreement by committing any crime or
27 providing or procuring any statement or testimony which is knowingly false, misleading, or materially
28 incomplete in any litigation or sentencing process in this case, or engages in any post-plea conduct

1 constituting obstruction of justice. Varying from stipulated Guidelines application or agreements
2 regarding arguments as to 18, United States Code, section 3553, as set forth in this Agreement,
3 personally or through counsel, also constitutes a violation of the Plea Agreement. The government also
4 shall have the right (1) to prosecute the defendant on any of the counts to which he pleaded guilty; (2) to
5 reinstate any counts that may be dismissed pursuant to this Plea Agreement; and (3) to file any new
6 charges that would otherwise be barred by this Plea Agreement. The defendant shall thereafter be
7 subject to prosecution for any federal criminal violation of which the government has knowledge. The
8 decision to pursue any or all of these options is solely in the discretion of the United States Attorney's
9 Office.

10 By signing this Plea Agreement, the defendant agrees to waive any objections, motions, and
11 defenses that the defendant might have to the government's decision. Any prosecutions that are not
12 time-barred by the applicable statute of limitations as of the date of this Plea Agreement may be
13 commenced in accordance with this paragraph, notwithstanding the expiration of the statute of
14 limitations between the signing of this Plea Agreement and the commencement of any such
15 prosecutions. The defendant agrees not to raise any objections based on the passage of time with respect
16 to such counts including, but not limited to, any statutes of limitation or any objections based on the
17 Speedy Trial Act or the Speedy Trial Clause of the Sixth Amendment to any counts that were not time-
18 barred as of the date of this Plea Agreement. The determination of whether the defendant has violated
19 the Plea Agreement will be under a probable cause standard.

20 In addition, (1) all statements made by the defendant to the government or other designated law
21 enforcement agents, or any testimony given by the defendant before a grand jury or other tribunal,
22 whether before or after this Plea Agreement, shall be admissible in evidence in any criminal, civil, or
23 administrative proceedings hereafter brought against the defendant; and (2) the defendant shall assert no
24 claim under the United States Constitution, any statute, Rule 11(f) of the Federal Rules of Criminal
25 Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by
26 the defendant before or after this Plea Agreement, or any leads derived therefrom, should be suppressed.
27 By signing this Plea Agreement, the defendant waives any and all rights in the foregoing respects.
28

1 F. Forfeiture.

2 The defendant agrees to forfeit to the United States voluntarily and immediately all of his right, title,
 3 and interest to any and all assets subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C.
 4 § 2461(c). Those assets include, but are not limited to, the following:

- 5 1. Seagrape Villa 1722 at the Four Seasons Resort Estate Nevis, “1722 Stewart’s Estate,”
 Federation of St Kitts-Nevis, West Indies, Lot 12, Clarks/Jessups (Stewarts Estate), Parish of St.
 Thomas, Island of Nevis;
- 6 2. All funds maintained at Deltec Bank and Trust, account number 1001021, held in the name of
 DC Solar International, Inc.;
- 7 3. All funds maintained at JP Morgan Chase, account number 371767515, held in the name of
 Jocarbo, LLC;
- 8 4. Any and all interests held by Jeffrey Carpooff in Whetstone Winery, Inc.;
- 9 5. Any and all interests held by Jeffrey Carpooff in JPC Group Investments;
- 10 6. Any and all interests held by Jeffrey Carpooff in Shift Solutions LLC;
- 11 7. Any and all interests held by Jeffrey Carpooff in Panda Bear International Ltd.;
- 12 8. Any and all interests held by Jeffrey Carpooff in MTO Cafe;
- 13 9. Any and all interests held by Jeffrey Carpooff in JMFC, Inc.;
- 14 10. Any and all interests held by Jeffrey Carpooff in PMFC Enterprises LLC;
- 15 11. Any and all interests held by Jeffrey Carpooff in LITV Entertainment Group, LLC;
- 16 12. Any and all interests held by Jeffrey Carpooff in Yountville Live;
- 17 13. 1969 Plymouth Roadrunner, VIN: RM23H9E119339;
- 18 14. 2018 Bentley Bentayga, VIN: SJAAC2ZV2JC016871;
- 19 15. 1969 Plymouth Roadrunner, VIN: RM21H9G224046;
- 20 16. 2015 Dodge Ram 5500 Chassis, VIN: 3C7WRMBL4FG594873;
- 21 17. 2018 Dodge Ram 2500 Tradesman, VIN: 3C6UR5CL1JG169183;
- 22 18. 2018 Dodge Ram 2500 Tradesman, VIN: 3C6UR5CL7JG169186;
- 23 19. 2014 Dodge Ram, VIN: 3C6UR5CL3EG291677;
- 24 20. 2014 Dodge Ram, VIN: 3C6UR5CL1EG147612;
- 25 21. 2018 Dodge Ram, VIN: 3C6UR5CL9JG169190;
- 26 22. 2000 Porsche Boxster, VIN: WP0CA2982YU626068;
- 27 23. 2017 Centurion Vessel, VIN: FINS1554F717;
- 28 24. Approximately \$580,000 in U.S. Currency held by Terry L. Davis and Susan Rush in Las Vegas,
 Nevada, and described in Case No. A-19-803784-C, filed in Clark County District Court, Jeff
 and Paulette Carpooff v. Terry L. Davis and Susan Rush;
- 29 25. Approximately \$200,000 in the form of a promissory note and deed of trust, extended to Terry L.
 Davis and Susan Rush, residents of Las Vegas, Nevada; and
- 30 26. Any and all sales proceeds from the vehicles sold in United States v. 2011 BMW 328I, VIN:
 WBAPH7C53BE460537, et al., 2:19-MC-00053-TLN-CKD, in the Eastern District of
 California.

26 The defendant agrees that the listed assets constitute or are derived from proceeds traceable to a
 27 violation of 18 U.S.C. § 1349.

1 The defendant agrees to fully assist the government in the forfeiture of the listed assets and to take
2 whatever steps are necessary to pass clear title to the United States. The defendant also agrees to
3 execute any and all paperwork required to forfeit additional assets connected to the charges to which he
4 pleaded guilty. The defendant shall not sell, transfer, convey, or otherwise dispose of any of his assets,
5 including but not limited to, the above-listed assets.

6 The defendant agrees not to file a claim to any of the listed property in any civil proceeding,
7 administrative or judicial, which may be initiated. The defendant agrees to waive his right to notice of
8 any forfeiture proceeding involving this property, and agrees to not file a claim or assist others in filing a
9 claim in that forfeiture proceeding.

10 The defendant knowingly and voluntarily waives his right to a jury trial on the forfeiture of
11 assets. The defendant knowingly and voluntarily waives all constitutional, legal and equitable defenses
12 to the forfeiture of these assets in any proceeding. The defendant agrees to waive any jeopardy defense,
13 and agrees to waive any claim or defense under the Eighth Amendment to the United States
14 Constitution, including any claim of excessive fine, to the forfeiture of the assets by the United States,
15 the State of California or its subdivisions. The defendant waives oral pronouncement of forfeiture at the
16 time of sentencing, and any defenses or defects that may pertain to the forfeiture.

17 The defendant agrees to sign a Stipulation for Final Judgment of Forfeiture in United States v. 725
18 Main Street, Martinez, California, et al., Case 2:19-CV-00247-JAM-DB, United States v.
19 Approximately \$6,567,897.50 Seized From CTBC Bank, Account Number 3800191916, et al., Case
20 2:19-cv-00485-JAM-DB, United States v. 5383 Stonehurst Drive, Martinez, California, et al., Case
21 2:19-cv-00636-JAM-DB, and a Consent Judgment of Forfeiture in United States v. 2011 BMW 328I,
22 VIN: WBAPH7C53BE460537, et al., Case 2:19-MC-00053-TLN-CKD. The stipulations must be
23 signed concurrently with the signing of this plea agreement.

24 The parties agree that if any portion of the net proceeds from the forfeited assets are paid to victims
25 through the remission or restoration process, that amount will be credited to the defendant's restitution
26 obligation.

27 **G. Asset Disclosure.**

28 The defendant agrees to make a full and complete disclosure of his assets and financial

1 condition, and will complete the United States Attorney's Office's "Authorization to Release
2 Information" and "Financial Affidavit" within five (5) weeks from the entry of the defendant's change
3 of plea, including supporting documentation. The defendant also agrees to have the Court enter an order
4 to that effect. The defendant understands that if he fails to complete truthfully and provide the described
5 documentation to the United States Attorney's office within the allotted time, he will be considered in
6 violation of the Agreement, and the government shall be entitled to the remedies set forth in section II.E
7 above, above.

8 **H. No Reduction in Sentence for Cooperation.**

9 As a condition of the terms of this Plea Agreement, the defendant agreed to full and complete
10 debriefs with the government regarding his criminal activities. Notwithstanding his agreement to
11 participate in those debriefs, the defendant understands and acknowledges that the government will not
12 make a motion in his case, pursuant to U.S.S.G. § 5K1.1, and the defendant agrees not to seek any
13 sentence reduction on the basis of the debriefs. The defendant agrees that the information he must
14 provide in the debriefs must be truthful or the government will have the remedies set forth in Part II.E of
15 this Agreement.

16 **III. THE GOVERNMENT'S OBLIGATIONS**

17 **A. Dismissals/Other Charges.**

18 The government agrees not to bring any other charges against the defendant arising from the
19 conduct outlined in the Factual Basis attached hereto as Exhibit A. The government also agrees not to
20 reinstate any dismissed count except if this Agreement is voided as set forth herein, or as provided in
21 paragraphs II.E (Violation of Plea Agreement by Defendant/Withdrawal of Pleas), VI.B (Estimated
22 Guideline Calculation), and VII.B (Waiver of Appeal and Collateral Attack) herein.

23 **B. Recommendations.**

24 1. Incarceration Range.

25 The government intends to recommend that the Court sentence the defendant to thirty years in
26 custody.

27 2. Acceptance of Responsibility.

28 The government will recommend a two-level reduction (if the offense level is less than 16) or a

1 three-level reduction (if the offense level reaches 16) in the computation of his offense level if the
 2 defendant clearly demonstrates acceptance of responsibility for his conduct as defined in U.S.S.G. §
 3 3E1.1. This includes the defendant meeting with and assisting the probation officer in the preparation of
 4 the pre-sentence report, being truthful and candid with the probation officer, and not otherwise engaging
 5 in conduct that constitutes obstruction of justice within the meaning of U.S.S.G. § 3C1.1, either in the
 6 preparation of the pre-sentence report or during the sentencing proceeding.

7 **C. Use of Information for Sentencing.**

8 The government is free to provide full and accurate information to the Court and Probation,
 9 including answering any inquiries made by the Court and/or Probation and rebutting any inaccurate
 10 statements or arguments by the defendant, his attorney, Probation, or the Court. The defendant also
 11 understands and agrees that nothing in this Plea Agreement bars the government from defending on
 12 appeal or collateral review any sentence that the Court may impose.

13 **IV. ELEMENTS OF THE OFFENSE**

14 At a trial, the government would have to prove beyond a reasonable doubt the following
 15 elements of the offense to which the defendant is pleading guilty.

16 **1. 18 U.S.C. § 1349—Conspiracy to Commit Wire Fraud (Count One).**

17 Although *not* elements of Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. § 1349,
 18 the elements of the underlying criminal offense (Wire Fraud, in violation of 18 U.S.C. § 1343) are:

- 19 a. The defendant knowingly participated in a scheme or plan to defraud, or a scheme or plan
 for obtaining money or property by means of false or fraudulent pretenses,
 representations, or promises;
- 21 b. The statements made or facts omitted as part of the scheme were material; that is, they
 had a natural tendency to influence, or were capable of influencing, a person to part with
 money or property;
- 23 c. The defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and
- 25 d. The defendant used, or caused to be used, an interstate wire communication to carry out
 or attempt to carry out an essential part of the scheme.

26 Thus, to convict the defendant at trial on the charge of Conspiracy to Commit Wire Fraud, in
 27 violation of 18 U.S.C. § 1349 (Count One), the government would have to prove beyond a reasonable
 28

doubt that:

- a. Beginning at least as early as in or about March 2011, and ending in or about December 2018, there was an agreement between two or more people to commit wire fraud as charged in the Information; and
 - b. Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

2. 18 U.S.C. § 1957(a)—Money Laundering (Count Two).

To convict the defendant at trial on the charge of Money Laundering, in violation of 18 U.S.C. § 1957(a), the government would have to prove beyond a reasonable doubt that:

- a. The defendant knowingly engaged or attempted to engage in a monetary transaction;
 - b. The defendant knew the transaction involved criminally derived property;
 - c. The property had a value greater than \$10,000;
 - d. The property was, in fact, derived from wire fraud, in violation of 18 U.S.C. § 1343; and
 - e. The transaction occurred in the United States.

The defendant fully understands the nature and elements of the crimes charged in the Information to which he is pleading guilty, together with the possible defenses thereto, and has discussed them with his attorney.

V. MAXIMUM SENTENCE

A. Maximum Penalties.

1. 18 U.S.C. § 1349—Conspiracy to Commit Wire Fraud (Count One).

The maximum sentence that the Court can impose on Count One is 20 years of incarceration, a fine of \$250,000, a 3-year period of supervised release and a special assessment of \$100. By signing this Plea Agreement, the defendant also agrees that the Court can order the payment of restitution for the full loss caused by the defendant's wrongful conduct. The defendant agrees that the restitution order is not restricted to the amounts alleged in the specific count to which he is pleading guilty. The defendant further agrees, as noted above, that he will not attempt to discharge in any present or future bankruptcy proceeding any restitution imposed by the Court.

2. 18 U.S.C. § 1957(a)— Money Laundering (Count Two).

1 The maximum sentence that the Court can impose on Count Two is 10 years of incarceration, a
2 fine of \$250,000 or twice the value of the property involved in the transaction, a 3-year period of
3 supervised release, and a special assessment of \$100. By signing this Plea Agreement, the defendant
4 also agrees that the Court can order the payment of restitution for the full loss caused by the defendant's
5 wrongful conduct. The defendant agrees that the restitution order is not restricted to the amounts alleged
6 in the specific count to which he is pleading guilty. The defendant further agrees, as noted above, that
7 he will not attempt to discharge in any present or future bankruptcy proceeding any restitution imposed
8 by the Court.

9 **B. Violations of Supervised Release.**

10 The defendant understands that if he violates a condition of supervised release at any time during
11 the term of supervised release, the Court may revoke the term of supervised release imposed on Count
12 One and Count Two and require the defendant to serve up to 3 additional years imprisonment.

13 **VI. SENTENCING DETERMINATION**

14 **A. Statutory Authority.**

15 The defendant understands that the Court must consult the Federal Sentencing Guidelines and
16 must take them into account when determining a final sentence. The defendant understands that the
17 Court will determine a non-binding and advisory guideline sentencing range for this case pursuant to the
18 Sentencing Guidelines and must take them into account when determining a final sentence. The
19 defendant further understands that the Court will consider whether there is a basis for departure from the
20 guideline sentencing range (either above or below the guideline sentencing range) because there exists
21 an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into
22 consideration by the Sentencing Commission in formulating the Guidelines. The defendant further
23 understands that the Court, after consultation and consideration of the Sentencing Guidelines, must
24 impose a sentence that is reasonable in light of the factors set forth in 18 U.S.C. § 3553(a).

25 **B. Stipulations Affecting Guideline Calculation.**

26 The government and the defendant agree that there is no material dispute as to the following
27 sentencing guidelines variables and therefore stipulate to the following:
28

1 (i) **Count One: 18 U.S.C. § 1349—Conspiracy to Commit Wire Fraud.**

2 1. **Base Offense Level:** The base offense level for the charges to which the defendant is
3 pleading guilty is 7. See U.S.S.G. §§ 2X1.1 and 2B1.1(a)(1).

4 2. **Specific Offense Characteristics:**

- 5 a. Thirty levels are added (+30) because the loss attributable to the defendant during
6 the time period of his knowing involvement in the conspiracy and within the scope
of his knowing involvement exceeded \$550,000,000. Id. at (b)(1)(P).
- 7 b. Two levels are added (+2) because the offense involved 10 or more victims. Id. at
8 (b)(2)(A).
- 9 c. Two levels are added (+2) because the offense involved sophisticated means and
10 the defendant intentionally engaged in or caused the conduct constituting
sophisticated means. Id. at (b)(10)(C).
- 11 d. Two levels are added (+2) because the defendant derived more than \$1 million in
12 gross receipts from one or more financial institutions as a result of the offense. Id.
13 at (b)(17)(A).

14 3. **Preliminary Offense Level:** The parties anticipate that the preliminary offense level
15 will be 43.

16 4. **Chapter Three Adjustments:**

- 17 a. Four levels are added (+4) because the defendant was an organizer and leader of a
18 criminal activity that involved five or more participants and was otherwise
extensive. U.S.S.G. § 3B1.1(a).
- 19 b. Two levels are added (+2) because the defendant willfully obstructed or impeded,
20 or attempted to obstruct or impede, the administration of justice with respect to the
investigation, prosecution, or sentencing of the instant offense of conviction and
any relevant conduct, and the obstructive conduct related to the defendant's offense
of conviction and any relevant conduct. U.S.S.G. § 3C1.1.

22 5. **Adjusted Offense Level:** The parties anticipate the adjusted offense level will be 49.

24 (ii) **Count Two: 18 U.S.C. § 1957(a)—Money Laundering.**

25 1. **Base Offense Level:** The base offense level for the charges to which the defendant is
26 pleading guilty is 7. See U.S.S.G. §§ 2S1.1(a)(1) and 2B1.1(a)(2).

27 2. **Specific Offense Characteristics:**

- 28 a. Thirty levels are added (+30) because the loss attributable to the defendant during the
time period of his knowing involvement in the conspiracy and within the scope of his

knowing involvement exceeded \$550,000,000. Id. at (b)(1)(P).

- 2 b. Two levels are added (+2) because the offense involved 10 or more victims. Id. at
3 (b)(2)(A).
- 4 c. Two levels are added (+2) because the offense involved sophisticated means and the
5 defendant intentionally engaged in or caused the conduct constituting sophisticated
means. Id. at (b)(10)(C).
- 6 d. Two levels are added (+2) because the defendant derived more than \$1 million in gross
7 receipts from one or more financial institutions as a result of the offense. Id. at
8 (b)(17)(A).
- 9 e. One level is added (+1) because the defendant was convicted under 18 U.S.C. § 1957.
U.S.S.G. § 2S1.1(b)(2)(A).

10 **3. Chapter Three Adjustments:**

- 11 a. Two levels are added (+2) because the defendant willfully obstructed or impeded, or
12 attempted to obstruct or impede, the administration of justice with respect to the
13 investigation, prosecution, or sentencing of the instant offense of conviction and any
relevant conduct, and the obstructive conduct related to the defendant's offense of
conviction and any relevant conduct. U.S.S.G. § 3C1.1.

14 **4. Preliminary Offense Level:** The parties anticipate that the preliminary offense level

15 will be **46**.

16 **1. Grouping Multiple Counts:**

- 17 a. The Counts in the Information to which the defendant is pleading guilty may be
18 grouped together under U.S.S.G. § 3D1.2(d).
- 19 b. The offense level applicable to the grouped Counts is **49**, which is the offense level
20 corresponding to the aggregate quantity of loss, determined in accordance with
Chapter Two and Parts A, B, and C of Chapter Three of the Sentencing Guidelines.
21 See U.S.S.G. § 3D1.3(b).

22 **2.** Three levels are subtracted (-3) if the defendant pleads guilty, accepts responsibility for
23 his offense, and the Specific Offense Level is above 16. U.S.S.G. § 3E1.1; see also Part III.B.2 above.

24 **3. Adjusted Offense Level:** Given the stipulations above, the parties anticipate that the
25 adjusted offense level will be **46**.

26 **4. Criminal History:** The parties agree and stipulate that the applicable criminal history
27 will be determined by the Court's probation officers. The parties estimate but do not stipulate that the
28

1 defendant's criminal history category will be I, and that the Guidelines sentencing range will be no
2 less than Life in prison, subject, however, to the maximum statutory sentence possible for the offenses
3 of conviction (30 years). The defendant understands that if his criminal history category differs from
4 the parties' estimate, his Guidelines sentencing range may differ from that set forth here.

C. Departures or Other Enhancements or Reductions.

The parties agree that they will not seek or argue in support of any other specific offense characteristics, Chapter Three adjustments (other than the decrease for “Acceptance of Responsibility”), or cross-references, except that the government may move for a departure or an adjustment based on the defendant’s post-plea obstruction of justice (§3C1.1). Both parties agree not to move for, or argue in support of, any departure from the Sentencing Guidelines.

11 The defendant also agrees that the application of the United States Sentencing Guidelines to his
12 case results in a reasonable sentence. The parties agree, however, that sentencing in this case will be
13 within the sound discretion of the Court. The defendant may request a sentence within the range of 25
14 years to 30 years and ask that the Court apply the sentencing factors under 18 U.S.C. §3553 to reach a
15 sentence of between 25 years to 30 years. But the defendant will not request that the Court apply the
16 sentencing factors to arrive at any sentence less than 300 months (25 years) in custody. The defendant
17 acknowledges that if the defendant requests or suggests in any manner a sentence less than 300 months
18 (25 years) in custody, that will be considered a violation of the Plea Agreement. The government's
19 remedies and remaining obligations in this Agreement shall be as outlined above in paragraph II.E.

VII. WAIVERS

A. Waiver of Constitutional Rights.

The defendant understands that by pleading guilty he is waiving the following constitutional rights: (a) to plead not guilty and to persist in that plea if already made; (b) to be tried by a jury; (c) to be assisted at trial by an attorney, who would be appointed if necessary; (d) to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, constitutional challenges to the statutes of conviction, and other pretrial motions that have been filed or could be filed; (e) to subpoena witnesses to testify on his behalf; (f) to confront and cross-examine witnesses against him; and (g) not to be compelled to incriminate himself.

1 **B. Waiver of Appeal and Collateral Attack.**

2 The defendant understands that the law gives the defendant a right to appeal his guilty plea,
3 conviction, and sentence. The defendant agrees as part of his plea, however, to give up the right to
4 appeal the guilty plea, conviction, and the sentence imposed in this case as long as the sentence does not
5 exceed the statutory maximum for the offenses to which he is pleading guilty (30 years), including if the
6 Court imposes consecutive terms on Counts One and Two. The defendant understands that this waiver
7 includes, but is not limited to, any and all constitutional and/or legal challenges to the defendant's
8 conviction and guilty plea, including arguments that the statutes to which the defendant is pleading
9 guilty are unconstitutional, and any and all claims that the statement of facts attached to this Agreement
10 is insufficient to support the defendant's plea of guilty. The defendant specifically gives up the right to
11 appeal any order of restitution the Court may impose.

12 Notwithstanding the defendant's waiver of appeal, the defendant will retain the right to appeal if
13 one of the following circumstances occurs: (1) the sentence imposed by the District Court exceeds the
14 statutory maximum for all Counts; and/or (2) the government appeals the sentence in the case. The
15 defendant understands that these circumstances occur infrequently and that in almost all cases this
16 Agreement constitutes a complete waiver of all appellate rights.

17 In addition, regardless of the sentence the defendant receives, the defendant also gives up any
18 right to bring a collateral attack, including a motion under 28 U.S.C. § 2255 or § 2241, challenging any
19 aspect of the guilty plea, conviction, or sentence, except for non-waivable claims.

20 Notwithstanding the government's agreements in paragraph III.A above, if the defendant ever
21 attempts to vacate his plea, dismiss the underlying charges, or modify or set aside his sentence on any of
22 the counts to which he is pleading guilty, the government shall have the rights set forth in Section II.E
23 herein.

24 **C. Waiver of Attorneys' Fees and Costs.**

25 The defendant agrees to waive all rights under the "Hyde Amendment," Section 617, P.L. 105-
26 119 (Nov. 26, 1997), to recover attorneys' fees or other litigation expenses in connection with the
27 investigation and prosecution of all charges in the above-captioned matter and of any related allegations
28 (including without limitation any charges to be dismissed pursuant to this Plea Agreement and any

1 || charges previously dismissed).

D. Impact of Plea on Defendant's Immigration Status.

The defendant recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including offenses to which the defendant is pleading guilty. The defendant and his counsel have discussed the fact that the charges to which the defendant is pleading guilty is an aggravated felony, or a crime that is likely to be determined to be an aggravated felony under 8 U.S.C. § 1101(a)(43), and that while there may be arguments that the defendant can raise in immigration proceedings to avoid or delay removal, it is virtually certain that the defendant will be removed.

Removal and other immigration consequences are the subject of a separate proceeding, however, and the defendant understands that no one, including his attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status. The defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States.

VIII. ENTIRE PLEA AGREEMENT

16 Other than this Plea Agreement, no agreement, understanding, promise, or condition between the
17 government and the defendant exists, nor will such agreement, understanding, promise, or condition
18 exist unless it is committed to writing and signed by the defendant, counsel for the defendant, and
19 counsel for the United States.

IX. APPROVALS AND SIGNATURES

A. Defense Counsel.

22 I have read this Plea Agreement and have discussed it fully with my client. The Plea Agreement
23 accurately and completely sets forth the entirety of the agreement. I concur in my client's decision to
24 plead guilty as set forth in this Plea Agreement.

Dated: 1/24/2024

~~MALCOLM SEGAL
Attorney for Defendant~~

B. Defendant:

I have read this Plea Agreement and carefully reviewed every part of it with my attorney. I understand it, and I voluntarily agree to it. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Sentencing Guidelines that may apply to my case. No other promises or inducements have been made to me, other than those contained in this Plea Agreement. In addition, no one has threatened or forced me in any way to enter into this Plea Agreement. Finally, I am satisfied with the representation of my attorney in this case.

Dated: 1-22-22

JEFF CARPOFF
Defendant

C. Attorney for United States:

I accept and agree to this Plea Agreement on behalf of the government.

Dated:

1/24/2020

MC GREGOR W. SCOTT
United States Attorney

ANDRÉ M. ESPINOSA
Assistant United States Attorney

1 EXHIBIT "A"
2 Factual Basis for Plea

3 **The Carpoffs' Ponzi-like scheme**

4 From December 2009 through January 2019, Jeff Carpoff and Paulette Carpoff, husband and
5 wife, owned and operated two closely related business entities, DC Solar Solutions, Inc. ("Solutions")
6 and DC Solar Distribution, Inc. ("Distribution") (collectively "DC Solar"). While starting as a
7 legitimate business, by at least 2011, DC Solar operated a Ponzi-like scheme that defrauded investors of
8 approximately \$1 billion through material misrepresentations and omissions related to the offer and sale
9 of investments designed to generate profit and trigger significant tax benefits for investors. The
10 conspirators induced victims to enter investment transactions organized around the manufacture and sale
11 of solar energy equipment by Solutions, which the investors leased back to Distribution. The
12 transactions imposed debt obligations on the investors in exchange for valuable tax benefits. As part of
13 the transactions, Distribution promised to cover those debt obligations by earning revenue from sub-
14 leasing the solar equipment to others. Yet Distribution never secured significant sub-leases or never
15 earned more than a tiny percentage of the debt obligations it agreed to cover. As a result, the
16 conspirators used Ponzi-like transfers of money paid by new investors to cover the obligations of
17 existing investors, eventually causing massive losses. Between mid-2016 and February 2019, the
18 headquarters for DC Solar was located in Benicia, California, in the Eastern District of California.

19 Jeff Carpoff ("Jeff") was the owner and operator of Solutions, and the Chief Executive Officer of
20 DC Solar. Jeff organized and directed the conspiracy from its start in approximately March 2011,
21 though December 2018. Jeff personally undertook and directed others to undertake acts intended to
22 mislead investors about material facts, to conceal those lies, and to lull victims of the fraud. Among
23 other things, Jeff: (a) caused the dissemination of materially false information to victims to induce them
24 to invest in transactions with DC Solar and to lull them after those deals closed; (b) caused the use of
25 later investor money to pay existing investor obligations arising out of the fraudulent transactions; (c)
26 participated in an accounting fraud to conceal the Ponzi-like operation of DC Solar's transactions from
27 victims and others; and (d) paid co-conspirators large sums to advance and conceal the conspiracy,
28 including paying two co-conspirators over \$1 million each for false contracts to deliver to investors.

1 Although they were co-conspirators, Jeff sometimes hid transactions related to the fraud from Paulette
2 and sometimes instructed individuals not to discuss certain aspects of the fraud with her.

3 Paulette Carpoft (“Paulette”) was the owner and operator of Distribution, and the Chief
4 Operations Officer of DC Solar. Paulette worked with Jeff to initiate and advance the conspiracy.
5 Paulette personally undertook and directed others to undertake acts intended to mislead investors about
6 material facts, to conceal those lies, and to lull victims of the fraud. Among other things, Paulette: (a)
7 made and directed periodic, Ponzi-like transfers of new investor money to cover the debt obligations for
8 existing investors; (b) managed transfers from Solutions to certain third-party lessees to create the
9 appearance of legitimate lease agreements between those third party lessees and the investor in Fund 9;
10 caused a co-conspirator to make and deliver false Commissioning Reports that certified the existence of
11 some of the solar equipment the conspirators sold to investors but never built; and (c) concealed the
12 false nature of those Commissioning Reports and the true operation of DC Solar’s Ponzi-like scheme
13 from investors and others.

14 Acts by Jeff and Paulette Carpoft, and acts by their co-conspirators, caused the execution of
15 dozens of interstate wire transfers of payments from victims of the fraud to accounts Jeff and Paulette
16 Carpoft controlled, totaling approximately \$1 billion. Jeff and Paulette Carpoft used that money to
17 support their lavish lifestyle during the nearly eight-year conspiracy. Among other things, the Carpofts
18 used proceeds of their fraud to purchase and invest in more than 150 luxury and collector vehicles,
19 luxury real estate in Lake Tahoe, Las Vegas, the Caribbean, Cabo San Lucas, Mexico, and elsewhere, a
20 suite at a professional football stadium, a subscription private jet service, and jewelry. The Carpofts
21 also used fraud proceeds to pay for a minor-league professional baseball team, a NASCAR racecar
22 sponsorship, a 2018 performance by an internationally known recording artist at a DC Solar holiday
23 party, and to make illicit payments to co-conspirators and others. The Carpofts not only made victims
24 of their corporate investor clients but also committed tax fraud based on tax benefits the Carpoft caused
25 those investors to pursue, knowing their fraudulent transactions did not support application of those
26 benefits.

27 ///

28 ///

The Fraud Scheme

1 **A. DC Solar sells MSGs to generate profit and to trigger tax benefits.**

2 Directly and through subcontractors, DC Solar built mobile solar generators (“MSGs”),
3 consisting primarily of solar panels placed on a wheeled-trailer. Distribution purported to lease those
4 MSGs to third parties, including negotiating lease agreements and collecting payments. Jeff Carpoff and
5 others acting at his direction touted the versatility of MSGs, and claimed there was a substantial market
6 demand for MSGs.

7 DC Solar, through Jeff Carpoff, his co-conspirators, and others acting at their direction, solicited
8 money from investors to purchase MSGs. A primary claim made to investors was that the purchase of
9 MSGs carried favorable tax consequences, in addition to a small profit stream. The tax benefits
10 included tax credits available for investment in alternative energy sources that permitted purchasers to
11 claim tax credits of up to approximately 30% of the total investment, and permitted deductions for the
12 depreciation of MSGs over a 5-year period. These tax benefits were significant. DC Solar structured
13 transactions with investors to maximize the tax benefits. Among other deals, DC Solar sold MSGs to
14 limited liability companies created specifically for such transactions. These companies were investment
15 funds, sometimes called tax-equity funds, permitted under the federal tax code (“Funds”).

16 **B. Transaction financing structure and the materiality of promised lease revenue.**

17 Through the Funds, investors purchased MSGs from Solutions for \$150,000 per MSG.
18 Typically, investors paid approximately \$45,000 per MSG in cash—approximately 30% of the overall
19 unit price—and financed the balance with Solutions. The \$45,000-per-unit price was the maximum
20 amount of the tax credit investors could claim per unit. The transactions were structured so investors
21 could immediately claim a dollar-for-dollar tax credit for the total they paid in cash to Solutions, per
22 MSG. Investors could also claim depreciation for each MSG, for five years. To complete the
23 transactions, the Funds delivered promissory notes to pay Solutions the remaining approximately 70% of
24 the sales prices over time. DC Solar promised to pay off the investors’ note obligations with revenues
25 generated by the lease of MSGs by Distribution to third parties.

26 Pursuant to offers pitched to investors by Jeff Carpoff, his co-conspirators, and others acting at
27 their direction, the Funds leased the MSGs purchased in each transaction to Distribution which, under
28 the management of Paulette Carpoff, purported to lease the MSGs to third parties. Distribution was
supposed to receive money from those third parties through lease payments. After deducting certain

1 fees, Distribution was to transfer the majority of the lease revenue to accounts for the Funds. The
2 manager of the investment funds was to use the lease revenue sent by Distribution to pay the periodic
3 obligations on the notes held by Solutions, with a small profit paid to investors when applicable.¹

4 The purported lease revenue from third parties was a material component of the transactions.
5 First, that projected lease revenue was a factor in valuing the MSGs at \$150,000 per unit. Second, the
6 lease revenue was the mechanism for the Funds to pay the remaining approximately 70% of the
7 purchase price for the MSGs. Based on sales pitches by Jeff Carpoff, his co-conspirators, and others
8 acting at his direction, investors were primarily interested in the tax benefits offered through each
9 transaction and not actual ownership of the MSGs. However, because the tax credits were capped at
10 30% of the value of the overall transaction, paying anything more than 30% of that value would
11 diminish the tax benefits—*i.e.*, the investors would pay more than the value of the tax credits. By
12 paying off the 70% balance of the purchase price through revenue generated by leases Distribution
13 promised to generate from third parties, investors maximized the tax benefits without incurring more
14 debt or cost. Failure of that mechanism after investors executed transactions would result in default on
15 the notes, collapse of the transactions, and failure of the tax credits.

16 **C. Purportedly independent certification of the construction and operation of MSGs.**

17 Because DC Solar promised to lease MSGs associated with each transaction to third parties—
18 through Distribution—with little direct participation from the Funds or investors, the Funds and
19 investors did not take physical possession of those MSGs. Rather, DC Solar represented to the Funds
20 and investors that it built MSGs for each transaction and those MSGs operated in a manner consistent
21 with regulations governing application of the tax credits the investors sought. DC Solar made those
22 representations through written Commissioning Reports, purportedly prepared by an independent
23 engineer after a multi-point inspection of each MSG in each transaction. Jeff Carpoff and Paulette
24 Carpoff, their co-conspirators, and others acting at their direction caused those Commissioning Reports
25 to include materially false information and to be delivered to investors. In some instances, investors
26

27

28 ¹ DC Solar also closed a variant of these tax-equity transactions that did not include financing through Solutions. Rather, in those sale-leaseback transactions, investors purchased MSGs outright, or relied on outside financing. In other material respects, the transactions mirrored the primary tax-equity transactions, including the management of third-party lease contracts by Distribution, availability of post-transaction tax benefits, and a profit stream. Instead of using third-party lease revenue to pay a note obligation to Solutions, the purported revenue was paid to the investor.

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1 required completed Commissioning Reports as conditions for payment to support the transactions. In
2 other instances, the conspirators caused delivery of the Commissioning Reports after payment to lull
3 investors to believe their MSGs existed and operated as required under the terms of the transactions.

4 **D. Approximate investments and tax benefit totals associated with the transactions.**

5 Between March 2011 and December 18, 2019, at least twelve investors entered into transactions
6 with DC Solar through approximately thirty-four Funds. Some investors invested through more than
7 one Fund. The investors, through the Funds, collectively deposited by interstate wire transfer
8 approximately \$759,400,000 into bank accounts for the Funds established for the transactions. Further,
9 several financial institutions and other investors transferred collectively \$152,700,000 to DC Solar as
10 part of related transactions for the purchase and lease of MSGs. In total, DC Solar closed transactions
11 with Funds and others that contributed an aggregate of more than \$912,000,000 to purchase MSGs.
12 Those transactions purportedly involved approximately 17,000 MSGs, at approximately \$2.5 billion in
13 purported value.

14 Many investors have claimed tax credits and depreciation in connection with the transactions
15 premised on the revenue allegedly being earned by Distribution's leases of the MSGs to third parties.
16 The tax value of the tax credits and depreciation claimed by the Funds, up to and including the 2017 tax
17 year, is approximately \$902,000,000. This figure does not account for approximately \$167,000,000 that
18 investors paid into tax equity transactions in 2018.

19 **E. Operation of the "flip" deals that followed the tax equity transactions.**

20 The DC Solar structured nearly all of the tax-equity transaction so the investors owned 99% of
21 the associated Fund and the fund manager owned 1% of the Fund. After five years, the ownership
22 structure flipped, with the fund manager owning 95% of the Fund and the investors owning 5%. After
23 five years, investors had the option of selling their 5% ownership interest in the Fund to the fund
24 manager, and divesting their ownership interest in the MSGs. This appealed to many investors because,
25 after five years, they could extract no further tax benefit from ownership of the MSGs.

26 At the end of a five-year term of a tax-equity transaction, DC Solar would arrange to sell certain
27 existing MSGs from those transactions to buyers in "flip" deals. In one such transaction, Jeff Carpoff
28 and his co-conspirators, including Paulette Carpoff, and others acting at their direction, brokered a "flip"
deal with A Group and K Bank. As part of that transaction, K Bank provided \$27 million to A Group, a

1 private equity group, to finance the purchase of approximately 416 MSGs that were owned by two
2 Funds through earlier tax-equity transactions. The \$27 million from K Bank represented approximately
3 80% of the overall transaction. A Group investors contributed the balance of the purchase price. The
4 deal was completed through a special purpose entity called S-Sense.

5 Jeff Carpooff and his co-conspirators, including Paulette Carpooff, and others acting at their
6 direction, represented to A Group and K Bank that the 416 MSGs were leased to Telecom Company A
7 as part of an approximately 10-year fixed amount contract between Telecom Company A and
8 Distribution. After the sale, S-Sense leased the MSGs back to Distribution to continue leasing them to
9 Telecom Company A as part of the purported existing contract between them. Thereafter, DC Solar
10 assigned purported lease revenue generated by that lease with Telecom Company A to S-Sense as a
11 revenue and profit stream.

12 **F. DC Solar's tax equity and other transactions were fraudulent.**

13 Jeff Carpooff, Paulette Carpooff, and their co-conspirators operated DC Solar as a Ponzi-like
14 scheme. The conspirators knowingly misrepresented the existence of lease revenue from third parties—an
15 integral component in all of DC Solar's transactions—and caused others to unwittingly do so. In
16 particular, the conspirators claimed Distribution generated tens of millions of dollars in lease revenue
17 from third parties, from long-term and short-term agreements with those third parties. Over 90% of the
18 money Distribution claimed as lease revenue and which it used to pay the Funds' note obligations and
19 other payments to investors was actually derived from transfers of cash contributed to Solutions by later
20 investors in tax-equity and other transactions. Solutions had nearly no other significant sources of
21 revenue. Solutions was the primary source of income for Distribution, providing no less than
22 approximately 94% of all of the purported revenue Distribution claimed. Thus, DC Solar merely paid
23 obligations due to older investors with money raised from those investors and later investors—contrary
24 to representations to investors made by Jeff Carpooff, Paulette Carpooff, their co-conspirators, and those
25 acting at their direction, that third-party lease revenue would pay those obligations. Certain of
26 Distribution's existing third-party lease agreements were supported with separate side-agreements,
27 pursuant to which Solutions paid investor money to third parties, which the third parties returned in the
28 form of lease revenue. These payments required approval by Paulette Carpooff. Specifically, on or about
July 21, 2015, and on or about November 2, 2015, Paulette Carpooff authorized and caused payments

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1 from Solutions to KMHS, a third-party equipment rental company that purported to be leasing MSGs
2 sold to the investors in Fund 9. Paulette Carpoff authorized and caused those and other similar
3 payments to create the appearance of a legitimate third-party lease supporting the Fund 9 tax equity
4 transactions when she knew there was no such legitimate lease.

5 The co-conspirators, including Jeff Carpoff and others acting at his direction, concealed the
6 absence of third-party lease revenue from investors through, among other means, false financial
7 statements they knowingly shared with investors.

8 **G. The A Group/K Bank “flip” deal transaction was fraudulent.**

9 The A Group/K Bank “flip” deal was also a fraud. Contrary to representation made by Jeff
10 Carpoff, his co-conspirators, and others acting at their direction, the purported “fixed-term lease”
11 between Telecom Company A and Distribution that supported the transaction was false. Jeff Carpoff
12 paid two conspirators \$1m each for the false contract. In truth, certain as-needed leases with Telecom
13 Company A generated only a fraction of the millions in annual revenue Jeff Carpoff and his co-
14 conspirators claimed supported the A Group/K Bank deal. The overwhelming majority of that purported
15 revenue derived from intercompany transfers of tax-equity investor money from Solutions to
16 Distribution. In support of the transaction, and in furtherance of the fraud, Jeff Carpoff and his co-
17 conspirators knowingly caused a fraudulent estoppel agreement to be delivered to A Group/K Bank in
18 support of the transaction, which purported to assign lease revenue to A Group/K Bank, when that lease
19 agreement and the purported revenue associated with it did not exist.

20 **H. The December 2018 searches and asset seizures, DC Solar’s bankruptcy, and the**
21 **MSG audit by investor-victims.**

22 In December 2018, law enforcement agents executed search warrants at DC Solar’s headquarters
23 and elsewhere. Agents also executed over 150 asset seizure warrants, resulting the seizure of
24 approximately \$60,000,000 in personal property and liquid assets derived from the fraud. During
25 execution of those warrants, agents recovered approximately \$1.7 million in cash in Jeff Carpoff’s office
26 safe and over \$150,000 in cash in other locations throughout the office suite.

27 In February 2019, DC Solar entered Chapter 11 bankruptcy. Thereafter, certain investor-victims
28 financed an independent audit of the existence and location of all MSGs DC Solar sold, based on
information that DC Solar had not built the total number of MSGs it represented to investors were part

1 of the tax-equity and other transactions. The audit confirmed the existence of approximately only 6,000
2 MSGs from the approximately 17,000 MSGs associated with sales to Funds in approximately thirty-four
3 tax-equity and other transactions. Among others, none of the approximately 2,280 MSGs associated
4 with Fund 29, involving over \$100,000,000 in cash paid by an investor in or about May 2017, were
5 located in the investor-victim audit. Additionally, only approximately eighty-one of the 2,280 MSGs
6 associated with Fund 33, involving more than \$90,000,000 in cash paid by the same investor in or about
7 July 2018, were located in the investor-victim audit. Between November 30, 2016, and December 2018,
8 DC Solar closed tax equity transactions with investors in ten Funds, which paid more than \$400 million
9 for approximately 9,155 MSGs. The investor-victim audit recovered only 138 of those 9,155 MSGs. In
10 spring 2018, Jeff Carpooff, in the presence of Paulette Carpooff, discussed with a co-conspirator an “exit
11 strategy” from the consequences of causing thousands of false Commissioning Reports to be delivered
12 to investors, including a plan to conceal the non-existent MSGs through buying them back and selling
13 the parts in false “paper” transactions.

14 **II. Additional Specific Facts Supporting the Defendant’s Guilty Plea**

15 **A. The fraud conspiracy caused interstate wires transfers.**

16 Jeff Carpooff agrees that his conduct discussed herein, and that of his co-conspirators, caused
17 interstate wire communications in furtherance of the fraud scheme from investors and others, including
18 interstate Fedwire deposits of money from the investor-victim in the Fund 30 transaction, P Company,
19 based in Ohio, to bank accounts in California controlled by DC Solar. Those interstate wire transactions
20 were reasonably foreseeable and include, among others, those set forth in the below table:

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22 ///
23 ///
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1	Company Bank	Account No.	Date	Deposit Amount	Payor
2	H Bank	5773XXX	5/17/2017	\$15,063,692	P Company
3	H Bank	5773XXX	7/20/2017	\$10,224,225	P Company
4	H Bank	5773XXX	8/24/2017	\$10,224,225	P Company
5	H Bank	5773XXX	8/29/2017	\$10,224,225	P Company
6	H Bank	5773XXX	9/25/2017	\$10,224,225	P Company
7	H Bank	ending 2481	7/31/2017	\$14,744,692.31	S-Sense related
8	H Bank	ending 2481	7/31/2017	\$3,753,307.69	S-Sense related
9	H Bank	ending 2499	7/31/2017	\$12,638,307.69	S-Sense related
10	H Bank	ending 2499	7/31/2017	\$3,201,692.31	S-Sense related

12 **B. The conspiracy fueled countless monetary transactions in proceed of the fraud.**

13 Jeff Carpoff agrees that he knowingly engaged in and directed monetary transactions involving
 14 proceeds from the fraud conspiracy in amounts greater than \$10,000, and that he knew that those
 15 transactions were, in fact, derived from the fraud conspiracy in which he participated. Those
 16 transactions also occurred in the United States. Those transactions include, among others, those set forth
 17 in the below table:

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Approximate Date	Description
January 23, 2017	Deposit of a check (#298) for approximately \$1,648,350 from an H Bank account ending in 3202, to support the purchase of luxury and collector vehicles at auction.
February 27, 2017	Wire transfer of approximately \$100,406.10 from an H Bank account ending in 2416, to support the purchase of a private jet travel.
May 15, 2017	Deposit of a check (#315) for approximately \$49,795 from an H Bank account ending in 2416, to support the purchase of jewelry.
June 16, 2017	Wire transfer of approximately \$3,572,979.47 from a CTB Bank account ending in 3430, to support the purchase of real property in Lake Tahoe, California.
August 7, 2017	Wire transfer of approximately \$500,000 from an H Bank account ending in 2416, to co-conspirator Ronald Roach.
August 7, 2017	Wire transfer of approximately \$500,000 from an H Bank account ending in 2416, to co-conspirator Individual 3.
August 11, 2017	Wire transfer of approximately \$350,000 from an H Bank account ending in 2416, to co-conspirator Individual 6.
August 22, 2017	Wire transfer of approximately \$350,000 from an H Bank account ending in 2416, to co-conspirator Ryan Guidry.
August 23, 2017	Deposit of a check (#298) for approximately \$135,508.88 from an H Bank account ending in 3202, to support the purchase of a 2018 Bentley Continental.
November 24, 2017	Deposit of a check (#105) for approximately \$1,000,000 from a JPM Bank account ending in 2373, to support the purchase of a 2007 Ford Shelby Super Snake.
December 20, 2017	Wire transfer of approximately \$522,598.07 from a CTB Bank account ending in 2542, to support the purchase of real property in Martinez, California.
June 8, 2018	Wire transfer of approximately \$939,208.48 from a CTB Bank account ending in 2732, to support the purchase of real property in Scottsdale, Arizona.
July 3, 2018	Wire transfer of approximately \$782,949, from a CTB Bank account ending in 1916, to support the purchase of a private suite at a professional football stadium.
August 31, 2018	Wire transfer of approximately \$1,056,562.12 from a CTB Bank account ending in 2542, to support the purchase of real property in Lafayette, California.
December 14, 2018	Wire transfer of approximately \$350,000 from a CTB Bank account ending in 1916, to pay an internationally known rapper to perform at a DC Solar holiday party.

I have read and carefully reviewed the Factual Basis for Plea with my attorney. I agree that as it concerns my conduct it is correct. I also agree that if this matter proceeded to trial, the United States could establish each of the facts contained within the Factual Basis for Plea beyond a reasonable doubt, and that those facts satisfy the elements of the offense to which I am pleading guilty.

Dated: 1-22-20

JEFF CARPOFF
Defendant

EXHIBIT B

RECEIVED
AND FILED

2019 MAR -4 PM 12: 10

U.S. BANKRUPTCY COURT
MARY A. SCHOTT CLERK

Fill in this information to identify the case:

Debtor 1	<u>DC Solar Solutions, Inc</u>
Debtor 2 (Spouse, if filing)	_____
United States Bankruptcy Court for the:	District of Nevada _____
Case number	<u>19-50130</u>

Official Form 410**Proof of Claim**

12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>Nixon Peabody LLP</u> Name of the current creditor (the person or entity to be paid for this claim)		
	Other names the creditor used with the debtor _____		
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____		
3. Where should notices and payments to the creditor be sent? Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Where should notices to the creditor be sent? Name <u>Robert N. H. Christmas, Esq.</u> Number <u>55 West 46th St., 25th Fl.</u> Street New York NY 10036 City State ZIP Code Contact phone <u>212-940-3103</u> Contact email <u>rchristmas@nixonpeabody.com</u>	Where should payments to the creditor be sent? (if different) Name <u>Nixon Peabody LLP (attn.: Diane Gerardi)</u> Number <u>50 Jericho Quadrangle, Suite 300</u> Street Jericho NY 11753 City State ZIP Code Contact phone <u>516-832-7526</u> Contact email <u>dgerardi@nixonpeabody.com</u>	
Uniform claim identifier for electronic payments in chapter 13 (if you use one): -----			
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on MM / DD / YYYY		
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____		

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor? No Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: 0 5 9 2

7. How much is the claim? \$ 111,223.95. Does this amount include interest or other charges?
 No
 Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
 Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
 Limit disclosing information that is entitled to privacy, such as health care information.

Legal services

9. Is all or part of the claim secured? No
 Yes. The claim is secured by a lien on property.

Nature of property:

- Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
 Motor vehicle
 Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: \$ _____

Amount of the claim that is secured: \$ _____

Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: \$ _____

Annual Interest Rate (when case was filed) _____ %

- Fixed
 Variable

10. Is this claim based on a lease? No
 Yes. **Amount necessary to cure any default as of the date of the petition:** \$ _____

11. Is this claim subject to a right of setoff? No
 Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Check one: <input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Up to \$2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Wages, salaries, or commissions (up to \$12,475*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). <input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)(____) that applies.	Amount entitled to priority
	\$ _____
	\$ _____
	\$ _____
	\$ _____
	\$ _____

* Amounts are subject to adjustment on 4/01/16 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

**The person completing this proof of claim must sign and date it.
FRBP 9011(b).**

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

**A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157, and 3571.**

Check the appropriate box:

- I am the creditor.
- I am the creditor's attorney or authorized agent.
- I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

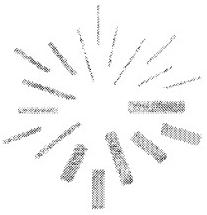
Executed on date 07/25/2019
MM / DD / YYYY

Signature

Print the name of the person who is completing and signing this claim:

Name	<u>Robert N. H. Christmas, Esq.</u>		
	First name	Middle name	Last name
Title	<u>Partner</u>		
Company	<u>Nixon Peabody LLP</u>		
	Identify the corporate servicer as the company if the authorized agent is a servicer.		
Address	<u>55 West 46th Street, 25th Floor</u>		
	Number	Street	
	<u>New York</u>	<u>NY</u>	<u>10036</u>
Contact phone	<u>212-940-3103</u>		Email <u>rchristmas@nixonpeabody.com</u>

FEDERAL I.D. NO. 16-0764720



**NIXON
PEABODY**

DC Solar Solutions MFG, Inc.
4901 Park Road
Benicia, CA 94510

Chapter 11 Filed 2/3/19
Case#19-50130
District of Nevada

February 22, 2019

Client No.: **059202**
Client Attorney: **Richard M. Cogen**

ACCOUNT STATEMENT

Invoice Date	Invoice Number	Amount Billed	Paid/Credit	Amount Unpaid
1/14/2019	10044073	57,653.55	0.00	57,653.55
1/14/2019	10044076	28,926.90	0.00	28,926.90
2/13/2019	10058971	24,643.50	0.00	24,643.50
Balance Total:		\$111,223.95	\$0.00	\$111,223.95

THESE INVOICES ARE FOR LEGAL SERVICES, AND THEY ARE CONFIDENTIAL AND SUBJECT TO ATTORNEY-CLIENT AND OTHER APPLICABLE PRIVILEGES.

EXHIBIT C

EXHIBIT A

Electronically FILED by Superior Court of California, County of Los Angeles on 08/26/2020 11:28 AM Sherri R. Carter, Executive Officer/Clerk of Court, by M. Barel, Deputy Clerk



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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL JUDICIAL DISTRICT**

**SOLARMORE MANAGEMENT
SERVICES, INC., a California
corporation; CARL AND BARBARA
JANSEN, a married couple,**

Plaintiffs,

vs.

**NIXON PEABODY, LLP, a New York
limited liability partnership; FORREST
DAVID MILDER, a married individual,**

Defendants.

Case No. 20STCV32546

COMPLAINT

**(Breach of Fiduciary Duty, Breach of
Contract, Unjust Enrichment, Negligent
Misrepresentation, Legal Malpractice, and
Aiding and Abetting)**

(Jury Trial Requested)

1 PRELIMINARY STATEMENT

2 Plaintiffs' claims arise from a fraud scheme that eventually resulted in the losses of \$2
3 billion to innocent purchasers, who thought they had purchased mobile solar energy generators
4 qualifying for valid and significant tax benefits.

5 One scheme provided that DC Solar Solutions would build and sell mobile solar
6 generators ("MSGs") to Funds, which were invested in by Purchasing Members. The Purchasing
7 Members provided the Funds with money that equaled \$150,000 for each MSG the Fund would
8 purchase from DC Solar Solutions. Typically, the Fund would make a thirty percent down
9 payment to DC Solar Solutions, which Nixon Peabody and Forrest Milder stated would qualify
10 for alternative energy tax credits. The Funds would then execute a Promissory Note in favor of
11 DC Solar Solutions, which would be paid over the course of twenty years, during which the
12 Funds would be permitted to depreciate the MSGs on favorable tax terms. However, the sale of
13 the MSGs and resulting tax credits proved to be a sham. In reality, there was no true market for
14 the MSGs sold to the Fund and the \$150,000 sale price was grossly overstated.

15 Nixon Peabody and Forrest Milder were directly involved in the DC Solar scheme by
16 providing Tax Opinions to the Funds, including the Purchasing Member, to encourage them to
17 execute the agreements that enabled the transactions described above. As Solarmore
18 Management's attorneys, Nixon Peabody and Forrest Milder owed the Plaintiffs a fiduciary
19 duty. Nixon Peabody and Forrest Milder were aware that the stated value of the MSGs was less
20 than presented to the Funds because the Internal Revenue Service initiated an audit of some of
21 the Funds as early as 2013. However, rather than alert each of the involved parties, including
22 their clients, the Plaintiffs, Nixon Peabody and Forrest Milder, in conjunction with DC Solar
23 Affiliates and the Principals, took steps to ensure Carl Jansen would become the hundred
24 percent owner of Solarmore Management, which was the manager of and held an interest in the
25

1 Funds. The Defendants wanted Jeff Carpooff to no longer be associated with Solarmore
2 Management so the Tax Opinions could state that an uninterested third party, Carl Jansen, was
3 the sole owner of Solarmore Management, rather than Jeff Carpooff or Paulette Carpooff, which
4 were the owners of DC Solar and its affiliates. However, this action did not resolve the issues
5 surrounding the manufactured sales price of the MSGs, the lack of lease revenues, or the
6 inability of the Funds to receive the benefit of the Tax Credits.

7 As a result, Nixon Peabody and Milder were able to continue to generate substantial legal
8 fees as a result of continuing the DC Solar schemes and cause enormous damages to the
9 Plaintiffs. Plaintiffs, for its complaint against Defendants, allege as follows:

10 THE PARTIES

11 1. Solarmore Management Services, Inc. (“**Solarmore Management**”) is a
12 California corporation authorized to do and doing business in California in the county of Los
13 Angeles. Solarmore Management is currently owned and managed by Carl Jansen (“**Jansen**”)
14 (Solarmore and Jansen are collectively the “**Plaintiffs**”).

15 2. Jansen and Barbara Jansen (“**Jansen’s Wife**”) are a married couple residing in
16 Illinois and doing business in the state of California in the county of Los Angeles.

17 3. Until December 12, 2019, Solarmore Management was the managing member of
18 the following California limited liability companies, which are collectively referred to as the
19 “**Solar Funds**” or the “**Purchasers**” and generally referred to as the “**Funds**.”

- 20 a. Solar Eclipse Investment Fund V, LLC
21 b. Solar Eclipse Investment Fund VI, LLC
22 c. Solar Eclipse Investment Fund VII, LLC
23 d. Solar Eclipse Investment Fund VIII, LLC
24 e. Solar Eclipse Investment Fund X, LLC
25 f. Solar Eclipse Investment Fund XI, LLC

- 1 g. Solar Eclipse Investment Fund XII, LLC
- 2 h. Solar Eclipse Investment Fund XIV, LLC
- 3 i. Solar Eclipse Investment Fund XV, LLC
- 4 j. Solar Eclipse Investment Fund XVI, LLC
- 5 k. Solar Eclipse Investment Fund XVII, LLC
- 6 l. Solar Eclipse Investment Fund XVIII, LLC
- 7 m. Solar Eclipse Investment Fund XIX, LLC
- 8 n. Solar Eclipse Investment Fund XXI, LLC
- 9 o. Solar Eclipse Investment Fund XXII, LLC
- 10 p. Solar Eclipse Investment Fund XXIII, LLC
- 11 q. Solar Eclipse Investment Fund XXIV, LLC
- 12 r. Solar Eclipse Investment Fund XXVI, LLC
- 13 s. Solar Eclipse Investment Fund XXVIII, LLC
- 14 t. Solar Eclipse Investment Fund XXXI, LLC

14 4. Solarmore Management is currently the 1% owner in each of the Solar Funds
15 except for Solar Eclipse Investment Fund V, Solar Eclipse Investment Fund VI, Solar Eclipse
16 Investment Fund VII, Solar Eclipse Investment Fund X, Solar Eclipse Investment Fund XI, and
17 Solar Eclipse Investment Fund XII in which Solarmore is the 95% owner.

18 5. The Solar Funds are tax-equity funds permitted under the Internal Revenue Code
19 (the “**Code**” or “**IRC**”), created specifically for the purpose of owning mobile solar generators
20 (“**MSGs**”).

21 6. Along with the managing member of the Solar Funds, which was Solarmore
22 Management up to December 12, 2019, each Fund has a purchasing member or members, which
23 provided money to purchase the MSGs.

24 7. As of December 18, 2019, Solarmore Management consented to resignation as
25 managing member of the Funds but remains a member of the Funds.

8. Nixon Peabody LLP (“Nixon”) is a New York limited liability partnership doing business in California in the county of Los Angeles.

9. Forrest David Milder (“Milder”) is an attorney and partner of Nixon at its Boston, Massachusetts office and doing business in California in the county of Los Angeles.

JURISDICTION & VENUE

10. This Court has subject-matter jurisdiction over Plaintiffs' claims because the claims arise under the laws of the State of California.

11. This Court has personal-matter jurisdiction, as each of the Parties are either California entities or persons doing business in California in the county of Los Angeles.

12. Without limiting the generality of the foregoing, each Defendant (directly or through agents who were at the time acting with actual and/or apparent authority and within the scope of such authority) has:

- a. Transacted business in California in the county of Los Angeles;
 - b. Contracted to supply or obtain services in California in the county of Los Angeles;
 - c. Availed themselves intentionally of the benefits of doing business in California in the county of Los Angeles;
 - d. Produced, promoted, sold, and/or distributed their products or services in California in the county of Los Angeles, and thereby have purposefully profited from their access to markets in California in the county of Los Angeles; and
 - e. Caused tortious damage by act or omission in California in the county of Los Angeles.

13. Venue is proper in this Court under Code of Civil Procedure section ("§") 395.5.

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FACTUAL ALLEGATIONS

14. Mike Silva (“Silva”) formed DC Solar Solutions Mfg., Inc. on or around July 30, 2
3 2009 in California.

15. Jeff Carpoff (“Carpoff”) and Paulette Carpoff (collectively the “Carpoffs”) 4
5 formed DC Solar Solutions, Inc. on or around September 29, 2010 in California.

16. The Carpoffs were involved with DC Solar Solutions Mfg., Inc. from its inception. 6

17. On or around March 5, 2012, DC Solar Solutions Mfg., Inc. changed its name to 7
8 DC Solar Solutions, Inc. (each is referred to as “**DC Solar Solutions**”) and filed documents with 9
the California Secretary of State stating that Carpoff was its president and Paulette Carpoff was 10
its secretary.

18. The Carpoffs incorporated DC Solar Distribution, Inc. (“**DC Solar Distribution**”) 11
12 in California on or around September 29, 2010.

19. In or about 2010, DC Solar Solutions created the first Funds, Solar Eclipse 13
Investment Fund, LLC and Solar Eclipse Investment Fund III, LLC, each California limited 14
liability companies, to own MSGs and solicit MSG purchases for tax benefits. 15

20. Solarmore Management Services, Inc. (“**Solarmore Management**”) is a 16
California corporation that was formed on or around November 7, 2013, by Carpoff. 17

21. Around the time of Solarmore Management’s formation, Carl Jansen (“**Jansen**”) 18
came to hold a twenty-one percent membership interest, while Carpoff continued to hold the 19
remaining seventy-nine percent. 20

1. **Nixon and Carpoff’s Method Behind the Solar Eclipse Investment Funds**

22. **A. Generally**

23. The Carpoffs would create investment funds (e.g., Solar Eclipse Investment Fund 24
V-VIII, X-XII, XIV-XIX, XXI-XXIV, XXVI, XXVIII, XXXI) (generally referred to as the 25

1 “Fund”), which would permit the investors to own a significant portion of the Fund
2 (“Purchasing Member(s”), and would purchase MSGs from DC Solar Solutions that were
3 then leased to DC Solar Distribution, which would allegedly re-lease the MSGs to generate
4 revenue, which would pay the Fund for the lease that would repay the loan from DC Solar
5 Solutions.

6 23. After the first few Funds were established, Solarmore Management was created to
7 manage the Funds that purchased MSGs.

8 24. In managing the Funds, Solarmore Management would own 1% of each Fund,
9 while the Purchasing Member would own the remaining 99% of the Fund. After five years, and
10 the expiration of the tax benefits, the ownership would flip and Solarmore Management would
11 own 95% of the Fund (“Flip Event”).

12 25. For its 1% interest in each Fund, Solarmore Management paid DC Solar Solutions
13 valuable consideration.

14 **B. The Process for Ensuring Investment into the Solar Eclipse Investment Funds**

15 26. The Purchasing Member would typically make a 30% down payment of the total
16 purchase amount to DC Solar Solutions on the MSG, through the Fund entity, which were sold
17 for \$150,000 each. For example, if a \$28,800,000 total purchase price was negotiated for the
18 MSGs, the Purchasing Member would originally make a down payment in the amount of
19 \$7,200,000 to the individual fund, which was provided to DC Solar Solutions, and then hold a
20 \$21,600,000 promissory note, which was payable over different terms to DC Solar Solutions.

21 27. Purchasing Members could then, immediately, claim a dollar-for-dollar tax credit
22 based upon 30% of the \$150,000 price. Purchasing Members could also claim depreciation for
23 each MSG for the next five years. These tax benefits were significant and amounted to hundreds
24 of millions of dollars across the Funds.

1 28. In arranging the transactions, Purchasing Members executed a standard package of
2 agreements, including: (i) a Limited Liability Company Agreement (“**LLC Agreement**”); (ii) a
3 Solar Equipment Purchase Agreement (“**Purchase Agreement**”); (iii) a Secured Promissory
4 Note (“**Promissory Note**”); and (iv) a Mobile Solar Equipment Lease (“**Equipment Lease**”)
5 (together the “**Fraud Contracts**”).

6 29. Nixon prepared tax opinion letters (generally referred to as “**Tax Opinion(s)**”)
7 confirming that the MSGs qualified for the “Energy Credit” under IRC § 48 to be provided to
8 the Purchasing Member prior to execution of the Fraud Contracts.

9 30. IRC § 48 allows for a thirty percent tax credit for certain energy-related
10 investments (hereinafter, the “Tax Credit” or the “Credit”).

11 31. Thus, Purchasing Members expected to be able to take a Tax Credit for roughly
12 the same amount as their cash contribution to the Fund.

13 32. The Tax Opinions indicated that the proposed structure and agreements would
14 provide the Purchasing Member five years of Tax Credits.

15 33. The Tax Opinions each stated “that the allocations of income, gain, deduction, loss
16 and credit as set forth in the Company Agreement, including the shift from 99:1 to 5:95, should
17 be considered neither shifting nor transitory and should pass an ‘overall substantiality’ test
18 within the meaning of Section 1.704-1(b)(2)(iii) of the Regulations and should therefore be
19 considered to have substantial economic effect and should therefore be respected.”

20 34. Further, the Tax Opinions provided “we are of the view that such diligent efforts
21 [to lease the MSGs] should ensure that the Mobile Solar Facilities continue to be eligible for the
22 Energy Credits (and thus, not subject to recapture), notwithstanding that such Mobile Solar
23 Facilities are not continuously in use.”

1 35. Nixon and Milder were aware and knew that the Tax Opinions would be provided
2 to the Purchasing Members to ensure they were comfortable with the prospect of the Tax Credits
3 and to indicate that the benefits were available to the Purchasing Members.

4 36. The Tax Opinions provided that “For the period beginning after the Flip Date (the
5 end of the year which is the fifth anniversary of the Company placing all the Mobile Solar
6 Facilities in service), the allocations of profits, losses and tax credits to the [Purchasing
7 Member] will be changed to 5% of profits, losses and tax credits for all income of the Company
8 and 95% to [Solarmore Management].”

9 37. The Tax Opinions stated Nixon was counsel or acted as counsel to Solarmore
10 Management, DC Solar Solutions, and DC Solar Distribution.

11 38. Nixon and Milder invoiced Solarmore Management at least \$608,016 for its
12 preparation of the Tax Opinions.

13 39. Solarmore Management paid these invoices to its attorneys at Nixon.

14 40. Through the Fraud Contracts, DC Solar Distribution promised that it would
15 arrange to sub-lease the MSGs to end-users.

16 41. The revenue from these sub-leases was essential for the Funds to be able to repay
17 the Promissory Notes to DC Solar Solutions and to justify the \$150,000 purchase price of each
18 MSG.

19 42. While the Fraud Contracts were executed, Carpooff would execute the Purchase
20 Agreement on behalf of DC Solar Solutions, while Paulette Carpooff would execute the
21 Equipment Leases on behalf of DC Solar Distribution.

22 43. While certain documents of the Fraud Contracts had minor variations in wording,
23 all of the Fraud Contracts largely contained the same substantive terms.

1 44. Under the terms of the LLC Agreements, an investor became the Purchasing
2 Member of an individual Fund, a special purpose LLC entity created specifically for the
3 purchase of MSGs.

4 45. The Fund then purchased MSGs from DC Solar Solutions at a price of \$150,000
5 per MSG under the Purchase Agreement.

6 46. The Purchase Agreement specified the total number of MSGs being purchased in
7 that specific transaction, as well as the total purchase price.

8 47. An Exhibit to the Purchase Agreement contained a blank space for the VINs for
9 the MSGs or stated that “VIN for each Generator [MSG] to be Supplied at Delivery.”

10 48. In exchange for the specified payment, DC Solar Solutions agreed to deliver the
11 MSGs by a certain date or dates and warranted “to Buyer that all Equipment shall be in good
12 working order in conformity with the Specifications for a period” of five or ten years.

13 49. The delivery dates of the MSGs specified in the Purchase Agreements were
14 occasionally scheduled in tranches.

15 50. The Purchase Agreements dictated that payments would be due to DC Solar
16 Solutions in tranches according to a schedule in part dictated by capital contributions being
17 made by the Purchasing Member under the terms of the LLC Agreement.

18 51. Those capital contributions were contingent on the Purchasing Members receiving
19 confirmation that the Generators were “Placed in Service” as evidenced by an “IE [Independent
20 Engineer] Certificate.”

21 52. Purchasing Members generally contributed about thirty percent (30%) of the
22 purchase price in cash and financed the balance pursuant to a Promissory Note(s) executed by
23 the Fund in favor of DC Solar Solutions.

24 53. The Promissory Note was an exhibit to the Purchase Agreement.
25

1 **C. Knowledge of the Fraud**

2 54. Forrest Milder (“**Milder**”) is an attorney of Nixon, based in its Boston,
3 Massachusetts office, and one of its “lead tax partners when it comes to tax credits and other
4 tax-advantaged investments.”

5 55. Milder works “hard to stay at the forefront of the industries in which [he is]
6 involved. For example [he is] very active in the Solar Energy Industry Association’s Tax
7 Committee, and [he] authored part of its recent proposal to the IRS on the solar tax credit
8 regulations.”

9 56. Milder was often with Carpoft and the DC Solar affiliates in California, including
10 Los Angeles.

11 57. During this time in Los Angeles, California, Nixon and Milder worked to
12 determine the best legal course for Carpoft and the DC Solar affiliates.

13 58. Starting as early as 2013, red flags began emerging in the DC Solar affiliates’
14 operations.

15 59. For example, during this time DC Solar Solutions, the Funds, and the Carpofts
16 individually became subject of audits by the Internal Revenue Service (“**IRS**”) and the State of
17 California regarding income, sales, and franchise taxes.

18 60. At the latest, Nixon was made aware of the 2013 IRS Audit in 2013, which raised
19 significant issues with the structure and likelihood of the Purchasing Members and Funds
20 receiving the Tax Credits.

21 61. Milder responded to learning this information by stating, “An audit from the IRS?
22 Is this even old enough to be audited?”

23 62. In subsequent emails to the Carpofts and others, (collectively, including Milder,
24 the “**Principals**”), Milder informed the parties that he had spoken with Cherly Meder (“**Meder**”)

1 of the IRS in an attempt to prevent a full fledged audit. Milder expressed that he and Meder had
2 concerns about \$25 million of tax deductions, while the company had no income.

3 63. As of 2013, Nixon and Milder were aware that DC Solar Distribution had created
4 or reported minimal revenue from the purported leases.

5 64. The Principals then scheduled for Meder to visit the DC Solar affiliates' facilities.

6 65. After the IRS investigation and 2013 Audit, the IRS issued a report on or around
7 August 18, 2016 (the "**Report**"). The Report provided that "[t]he partnership entity that is the
8 subject of this audit, Solar Eclipse Investment Fund III (Solar Eclipse) is a sham because it does
9 not involve any meaningful risk or opportunity for gains. Similarly, The Sherwin-Williams
10 Company was not a bona fide partner. Under both theories, substantially all items of credit and
11 deduction are re-allocated to the managing partner, Solarmore Investments, Inc."

12 66. The Report further provides, "This appraisal presents only a FMV valuation, and
13 does not address cost basis. Because the latter is the only value allowable under these
14 circumstances the A&M appraisal is categorically not applicable for calculating the IRC § 48
15 Tax Credit. Even if the FMV were allowable in this case, the A&M appraisal is unacceptable.
16 The taxpayer (Solar Eclipse Investment Fund III, LLC) used a related-party circular transaction
17 and an unacceptable appraisal to overstate the value of its energy property. The taxpayer
18 purchased the property from a related party in a non-arms-length transaction. The purported
19 purchase price was seller-financed and the repayment on the loan was financed by leases to
20 parties related to the seller. Taxpayer's repayment of the loan does not represent a genuine
21 economic outlay, and thus does not reflect an arms-length purchase price. The IRS has adjusted
22 the taxpayer's basis in the energy."

23 67. In discussing the actual basis, the IRS Report stated, "The taxpayer used its
24 related-party purchase price of \$150,000 per unit to calculate the tax credit. An IRS engineer has
25

1 made an independent estimate of the taxpayer's costs basis for one of these mobile solar
2 generators. Exam estimates the taxpayer's cost basis of one unit was less than \$25,000 per unit
3 in that year. The IRS revenue agent and engineer have also looked for the best information of
4 the property's cost basis, and find a credible cost basis for the set of 152 trailer units to be
5 \$2,496,000-or approximately \$13,000 each, a lower unit cost due to economies of scale."

6 68. While knowing this and that the 2013 Audit was under investigation and ongoing,
7 Nixon and Milder continued to issue Tax Opinions with the same framework as the ones in
8 question under the Report.

9 69. For example, on November 29, 2016, Nixon and Milder issued a Tax Opinion with
10 regards to Solar Eclipse Investment Fund XXVI, LLC. Within this opinion, Nixon stated "there
11 is no litigation or governmental proceeding pending or threatened against or involving the
12 Mobile Solar Facilities, the Company, the Managing Member, the Sponsor, the Lessee, the
13 Investor Member, or any Affiliates of the foregoing, that would materially adversely affect the
14 business of the Company or the condition of the Mobile Solar Facilities."

15 **D. Nixon and Milder's Sleight of Hand to Skirt the Report**

16 70. Nixon and Milder were made aware of significant issues through the 2013 Audit,
17 which required a modification of the parties' relationship. The modification removed Carpoff as
18 a 79% owner of Solarmore Management and had Jansen take this interest. The change permitted
19 the Tax Opinions to state that the sponsor, DC Solar Solutions, Inc., was owned 100% by
20 Carpoff, the Lessee, DC Solar Distribution, Inc., was owned 100% by Paulette Carpoff, and the
21 Managing Member, Solarmore Management Services, Inc., was owned 100% by Jansen,
22 "someone who is completely unrelated to the other parties to the transaction."

23 71. On information and belief, Nixon and Milder were critical in ensuring this
24 modification to the Solarmore Management occurred.

1 72. This change occurred after the 2013 IRS Audit investigation began.

2 73. Essentially, the Principals, including Nixon, attempted to ensure an unrelated party
3 to the transactions by having Jansen become the hundred percent owner of Solarmore
4 Management, which was the Managing Member of the Funds.

5 74. On information and belief, Ronald Roach (“**Roach**”), the CPA and Accountant for
6 the DC Solar enterprise, and Nixon and Milder, the attorneys for the DC Solar affiliates,
7 evaluated the investigations of the 2013 IRS Audit and understood the problems associated with
8 Carpoff being associated on nearly all sides of the transactions.

9 75. On information and belief, Nixon and Milder formulated a plan for a third party,
10 which ended up being Jansen, to become the 100% owner of Solarmore Management so that the
11 Tax Opinions could state, Solarmore Management was owned 100% by Jansen, “someone who
12 is completely unrelated to the other parties to the transaction.”

13 76. Roach approached Jansen in or around December 2014, and indicated that he
14 should take over Solarmore Management, as the one-hundred percent owner.

15 77. On information and belief, Nixon and Milder were aware of Roach’s approach as
16 an attempt for the DC Solar affiliates to skirt the issues presented in the Report.

17 78. Jansen inquired as to the value of the MSGs because he was aware that Solarmore
18 Management would be responsible for the remaining balance of the Promissory Notes at the Flip
19 Event.

20 79. Jansen was told that the MSGs would retain a significant amount of their value
21 after the Flip Event, which was above the loan balance still owed to DC Solar Solutions.

22 80. The Principals ensured that Jansen was informed that the MSGs had a value in
23 excess of the remaining balance on the Promissory Notes plus \$10,000 for each MSG.

1 81. Therefore, of the 7,000 units the Funds would own, Jansen expected to be the
2 owner of units, which would have a net value of \$70,000,000.

3 82. Unbeknownst to Jansen, however, Nixon and Milder were aware that the MSGs
4 were not being leased at the rates as indicated in the Fraud Documents.

5 83. Based on the representations made to Jansen by the Principals, Jansen agreed to
6 become the 100% owner of Solarmore Management.

7 84. Without payment of these Promissory Notes from true third-party leases, all of DC
8 Solar affiliates would come crashing down, which eventually occurred.

9 85. Determining a method in which the Carpofts could continue deploying their
10 scheme was in the best interest of each of the Principals, but not Jansen, as each of the Principals
11 continued to be paid substantial amounts of their fees as long as new Fraud Documents were
12 executed and new funds were created.

13 86. During 2016 and 2017, as some of the Funds began nearing the Flip Event, Jansen,
14 believing Solarmore Management would soon be the majority member of those Funds and
15 effective owner of thousands of MSGs, began asking questions of the Carpofts and other
16 involved parties regarding potential tax implications and other ownership-related effects.

17 87. Nixon and Milder knew the Lease revenues from end-users of the MSGs were
18 critical to the legitimacy of the businesses of DC Solar Solutions and DC Solar Distribution
19 because it was to provide the money that DC Solar Distribution needed to make lease payments
20 to the Funds, and those payments were critical to the Funds' ability to make payments on the
21 Promissory Notes to DC Solar Solutions.

22 88. While Jansen was asking questions to Nixon and Milder, Milder responded to
23 Jansen stating, "Now you know why you are the hundred percent owner of Solarmore
24 Management."

1 89. Because Jansen had begun asking questions and seeking additional information
2 that he realized he was not being provided, to conceal their actions, the Principals initiated the
3 creation of Halo in 2016, with Roselli as the managing member.

4 90. Upon information and belief, Roselli was or is a personal friend of the Carpooffs
5 and had a previous business relationship with Paulette Carpooff.

6 91. After Halo was formed, it took the previous place of Solarmore Management, as
7 the managing member of the new funds.

8 92. This insured that the Principals could continue perpetuating their scheme and
9 ensuring additional Fraud Documents would be completed and funded.

10 93. Although DC Solar Distribution purported to be earning millions each month in
11 lease revenue from end-users of the MSGs, bank records demonstrate that DC Solar Distribution
12 generated minimal lease revenue from subleases to end-users.

13 94. Email records demonstrate that the sublease revenue was \$138,138.64 for 2012,
14 \$278,179.74 for 2013, \$321,717.06 for 2014, and \$1,419,570.80 for 2015, for a grand total over
15 four years of \$2,157,606.24.

16 95. The actual cash requirement from the subleases of the MSGs under DC Solar
17 Distribution's lease program over that same four-year period – stated as a percentage of
18 promised utilization – was a dismal 3.78%.

19 96. The failure of the sublease program also endangered the touted tax benefits of the
20 MSG transactions.

21 97. This failure of the sublease program also invalidated the stated appraisal value of
22 MSGs for ongoing or new purchaser transactions.

23

24

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1 98. On information and belief, Nixon was aware of the lagging sublease revenues
2 while continuing to execute the Tax Opinions, ensuring additional Fraud Documents and Funds
3 were created.

4 99. On or about 2017, SolarSense, a solar energy provider, began negotiations to buy
5 MSGs from an existing Fund.

6 100. However, rather than taking a promissory note carryback note to DC Solar
7 Solutions, SolarSense attempted to arrange financing for its purchase of MSGs through
8 KeyBank.

9 101. During KeyBank's due diligence, KeyBank requested, among other things, a list
10 of end-user/subleases, pro forma financials for DC Solar Distribution, samples of subleases, and
11 DC Solar Distribution's QuickBooks.

12 102. On information and belief, SolarSense and KeyBank closed their transaction in
13 reliance on the Principals' representation and promise of information to be delivered.

14 103. On information and belief, KeyBank began to suspect, after closing, the claimed
15 subleases and claimed sublease revenues were false.

16 104. The Principals informed Jansen of the sale of the MSGs from the existing Fund,
17 which made him ecstatic because it showed that his risk of becoming the 100% owner of
18 Solarmore Management was validated by a third party. However, Jansen and the third-party
19 were not aware of the fraud perpetuated on SolarSense and KeyBank, which made the
20 excitement short lived.

21 105. In December 2018, law enforcement agents executed federal search warrants at
22 DC Solar's headquarters and other locations, seizing over \$60 million in assets.

23 106. On January 30, 2019, the first DC Solar company filed for Chapter 11 bankruptcy.

1 107. Thereafter, additional DC Solar-affiliated companies filed for Chapter 11
2 bankruptcy.

3 108. Subsequently all the DC Solar Chapter 11 cases were converted to Chapter 7
4 liquidation.

5 109. In learning the information that Nixon and Milder were aware of, as early as 2013,
6 the Plaintiffs incurred substantial costs and damages in an attempt to correct the damages caused
7 by Nixon and Milder.

8 110. For example, the Plaintiffs were required to pay legal fees in order to enter the
9 tolling agreement associated with this action, make advances to and for the benefit of the Funds,
10 operating expenses of Solarmore Management and the Funds, expenses to locate the actual
11 MSGs that existed, attorneys' fees to benefit the Funds, at least one million dollars of penalties
12 and interests to the IRS, which Nixon and Milder determined would be avoided because of the
13 Tax Credits for the benefit Solarmore Management, and the loss of its expectation profits from
14 the sale of the MSGs (the "Additional Damages").

CLAIMS FOR RELIEF

COUNT I

(Breach of Fiduciary Duty)

18 111. Plaintiffs repeat, reallege, and incorporate each and every prior factual allegation
19 in the preceding paragraphs as if fully set forth herein.

112. Solarmore Management became a client of Nixon and Milder on or around its
formation in November 2013.

22 113. Nixon stated, in each of the Tax Opinions, that it was the counsel for Solarmore
23 Management.

1 114. As an attorney for Solarmore Management, Nixon and Milder owed Solarmore
2 Management a fiduciary duty, which includes a duty of loyalty.

3 115. Nixon and Milder owed Jansen a fiduciary duty when Jansen was a twenty-one
4 percent and one-hundred percent owner of Solarmore Management.

5 116. Nixon and Milder breached the fiduciary duty by failing to provide Solarmore
6 Management or Jansen, the information it had related to the lack of justification for the Tax
7 Opinions.

8 117. Nixon and Milder breached their fiduciary duty by choosing the interests of the
9 Principals, including the Carpoffs, over those of Solarmore Management and Jansen.

10 118. Nixon and Milder breached their fiduciary duty by failing to provide Solarmore
11 Management or Jansen information it knew, which caused substantial risk and damage to Jansen
12 in becoming a one hundred percent owner of Solarmore Management.

13 119. In addition, upon information and belief, Nixon and Milder breached their
14 fiduciary duties to Solarmore Management and Jansen in ways that are currently unknown to
15 Plaintiffs but will be learned during discovery.

16 120. Nixon and Milder's breaches of their fiduciary duty proximately caused the
17 damages suffered by Solarmore and Jansen.

18 121. While Solarmore Management and Jansen will prove their damages at trial, their
19 damages include, but are not limited to, attorneys fees paid to Nixon and Milder, costs of
20 acquiring the hundred percent ownership in Solarmore Management, the cost of acquiring one
21 percent in each of the Funds, the Additional Damages, and any damages that result from the
22 personal guarantees that were required in each of the Fraud Documents.

23

24

25

COUNT II

(Breach of Contract)

3 122. Plaintiffs repeat, reallege, and incorporate each and every prior factual allegation
4 in the preceding paragraphs as if fully set forth herein.

5 123. Solarmore Management and Nixon entered into a contract to provide legal
6 services relating to its interest in each of the Funds.

7 124. Solarmore Management paid Nixon's invoices for these legal services under the
8 contract.

9 125. Under the contract, Nixon and Milder were to provide Solarmore Management and
10 Jansen legal advice that was accurate and complete, as well as advise their clients on issues
11 relating to the DC Solar affiliates that could effect their interest in the Funds.

12 126. Defendants breached the contract by providing legal advice that it knew or should
13 have known was incorrect.

127. Solarmore Management relied on this legal advice, to its detriment.

15 128. Specifically, Nixon and Milder incorrectly advised Solarmore Management and
16 Jansen that the Tax Credits would be authorized and that Solarmore Management would become
17 the owner of numerous MSGs, which had a value in excess of the Promissory Notes that were
18 due by the Funds to DC Solar Solutions.

19 129. As a result of Nixon and Milder's breach of the contract, Solarmore Management
20 and Jansen have suffered damages that will be proven at trial, which will include, but not be
21 limited to, attorneys fees paid to Nixon and Milder, costs of acquiring the hundred percent
22 ownership in Solarmore Management, the cost of acquiring one percent in each of the Funds,
23 and any damages that result from the personal guarantees that were required in each of the Fraud
24 Documents.

130. Plaintiff is entitled to an award of its reasonable attorneys' fees and costs pursuant to Code of Civil Procedure §§ 1021, 1717, as the contract between Plaintiffs and Nixon awards attorneys' fees to the prevailing party in an action related to a breach of that contract.

COUNT III

(Unjust Enrichment *brought in the alternative*)

131. Plaintiffs repeat, reallege, and incorporate each and every prior factual allegation in the preceding paragraphs as if fully set forth herein.

132. In the alternative to Plaintiffs' breach of contract claim, Plaintiffs' allege Nixon and Milder were unjustly enriched at the expense of Solarmore Management and Jansen.

133. Nixon and Milder benefited from of hundreds of thousands of dollars from Solarmore Management, to continue executing Fraud Documents, which it knew were premised on false assumptions.

134. Solarmore Management and Jansen were deprived of the Solarmore Management funds that were paid to Nixon and Milder.

135. Nixon and Milder knew that if Solarmore Management and Jansen knew the truth, they would not continue participating in the Funds.

136. As a result Solarmore Management and Jansen were damaged in an amount to be proven at trial, which will include, but not be limited to, the attorneys fees paid to Nixon and Milder by Solarmore Management, and any other funds Nixon and Milder acquired related to the Funds, Fraud Documents, and Tax Opinions.

COUNT IV

(Negligent Misrepresentation)

137. Plaintiffs repeat, reallege, and incorporate each and every prior factual allegation in the preceding paragraphs as if fully set forth herein.

1 138. Nixon and Midler misrepresented significant amounts of representations
2 throughout their representation of Solarmore Management.

3 139. Specifically, Nixon and Midler misrepresented the value of the MSGs in the Tax
4 Opinions.

5 140. Nixon and Midler misrepresented that the Fraud Documents and transactions
6 related to the Funds were under audit by the IRS and the impact these audits would have on the
7 Funds.

8 141. Nixon and Midler were Solarmore Management's attorneys and had a duty to
9 disclose the truth to their clients.

10 142. By ensuring that Solarmore Management and Jansen would not believe that there
11 were any significant problems, Nixon and Midler achieved their intent, to prevent Solarmore
12 Management and Jansen from inquiring further about the ongoing transactions, and to ensure
13 that additional Funds were created.

14 143. Nixon and Midler knew that Solarmore Management and Jansen did not know the
15 truth about the lease revenues and the audits of the Funds.

16 144. Solarmore Management and Jansen had an expectation to believe that their
17 attorneys, they were paying hundreds of thousands of dollars to, would alert them or inform
18 them of concerns relating to the Fraud Documents and audits by governmental agencies.

19 145. Because Solarmore Management and Jansen did not know the truth, which Nixon
20 and Midler knew, they continued to operate as the Manager of new Funds, and continued to pay
21 Nixon's attorneys' fees and invoices, and continued to purchase a one-percent membership
22 interest in each of the Funds.

23 146. The specific amount of damages will be proven at trial.
24
25

COUNT V

(Legal Malpractice)

3 147. Plaintiffs repeat, reallege, and incorporate each and every prior factual allegation
4 in the preceding paragraphs as if fully set forth herein.

5 148. Solarmore Management was a client of Nixon and Milder.

6 149. As a client, Nixon and Milder owed a duty to use the skill, prudence, and diligence
7 as commonly exercised by other members of the legal profession.

8 150. Nixon and Midler breached this duty by perpetuating the Fraud Documents,
9 including the Tax Opinions, and the Funds' transactions to the detriment of their client,
10 Solarmore Management.

11 151. Nixon and Midler further breached this duty by putting their clients', DC Solar
12 Distribution, DS Solar Solutions, and the Carpoffs, interests ahead of Solarmore Management,
13 also their clients.

14 152. In putting other clients' interests ahead of Solarmore Management's interest, the
15 Plaintiffs were damaged an amount to be proven at trial, which includes, but is not limited to,
16 attorneys' fees paid to Nixon and Midler for legal services that were not in their best interest, for
17 purchasing and becoming the 100% owner of Solarmore Management when the Principals and
18 Nixon knew that the lease revenues were substantially lower than expected or necessary to
19 create value for the Funds, and for purchasing a one-percent membership interest in each of the
20 Funds.

153. Had Nixon and Midler performed their duty, as commonly exercised by other
lawyers, Nixon and Midler would have advised Solarmore Management and Jansen to seek
independent counsel that was not also counsel to the related parties or that had an interest in the
Fraud Documents and Tax Opinions.

1 154. Further, Nixon and Midler should have been able to advise Solarmore
2 Management and Jansen to ask specific questions related to the sufficiency of the leases of the
3 first operating Funds. Instead, Nixon and Midler concealed information from and ensured that
4 Solarmore Management and Jansen were not informed about certain information, to ensure
5 additional Funds would be created to grow their revenue.

COUNT VII

(Aiding and Abetting Negligent Misrepresentation)

8 155. Plaintiffs repeat, reallege, and incorporate each and every prior factual allegation
9 in the preceding paragraphs as if fully set forth herein.

10 156. Nixon and Milder were aware of the problems caused by the relationship between
11 Solarmore Management, the DC Solar affiliates, and the Principals.

12 157. DC Solar affiliates and the Principals owed Solarmore Management and Jansen a
13 duty through its contractual relationships and as business partners and investors in the Funds.

14 158. Nixon and Milder knew that the execution of the Fraud Documents and the
15 strategy for Jansen to become the one-hundred percent owner of Solarmore Management
16 constituted a breach of these duties by the DC Solar affiliates and the Principals.

17 159. Nixon and Milder provided substantial assistance and encouragement by issuing
18 and continuing to issue the Tax Opinions after knowing the structure would not result in the Tax
19 Credits and that the purported lease revenues were significantly lower than originally indicated.

160. This action caused Solarmore Management to continue to invest in the Funds.

161. These actions caused Jansen to become the one-hundred percent owner of
Solarmore Management.

23 162. These actions were done for the benefit of the DC Solar affiliates and the
24 Principals to ensure Nixon and Milder would continue to receive attorneys' fees and revenue

1 from the work related to the DC Solar affiliates and the Principals. Without the creation of new
2 funds, Nixon and Milder knew the DC Solar affiliates would implode.

3 163. Nixon and Milder owed a duty to Solarmore Management and Jansen to
4 competently advise their clients and put their clients' interests ahead of their own. By
5 encouraging the actions that were taken, Nixon and Milder breached their duties to Solarmore
6 Management and Jansen.

7 **WHEREFORE**, Plaintiffs request this Court to enter judgment in their favor and against
8 the Defendants as follows:

- A. Awarding the Plaintiffs compensatory damages in an amount to be proven at trial;
 - B. Awarding the Plaintiffs punitive damages in an amount to be proven at trial;
 - C. Awarding the Plaintiffs damages for their pain and suffering in an amount to be proven at trial;
 - D. Awarding the Plaintiffs their attorneys' fees and costs pursuant to Code of Civil Procedure §§ 1021, 1717.
 - E. Awarding the Plaintiffs interest on all sums awarded, said interest calculated at the maximum rate allowed by law from the time of judgment until paid in full; and
 - F. Granting the Plaintiffs such other relief as the Court may deem appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 26th day of August, 2020.

/s/ John Snow

Howard King, Esq.

John Snow, Esq.

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8
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10

11 **ORIGINAL** electronically filed this
12 _____ day of August, 2020 using the
13 Courts E-Filing Online website.
14

15 By: _____
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EXHIBIT D

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11 || Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**SOLARMORE MANAGEMENT
SERVICES, INC., a California corporation.**

16 || Plaintiff,

17 | V.

18 Bankruptcy Estate of DC SOLAR
SOLUTIONS, INC. dba DC SOLAR
19 SOLUTIONS MFG, INC. dba DC SOLAR
SOLUTIONS MANUFACTURING, INC., a
20 California corporation; Bankruptcy Estate of
DC SOLAR DISTRIBUTION, INC., a
21 California corporation; Bankruptcy Estate of
DC SOLAR FREEDOM, INC., a California
22 corporation; MATTHEW CARPOFF, an
individual; LAUREN CARPOFF, an
23 individual; ROBERT V. AMATO and
PRISCILLA AMATO, husband and wife;
ROBERT KARMANN, an individual;
RONALD J. ROACH, an individual;
25 SEBASTIAN JANO, an individual; STEVE
WILDE, an individual; RYAN GUDRY, an
individual; PATRICK MOORE, an
individual; HALO MANAGEMENT
26 SERVICES LLC, a Nevada limited liability
company; SCOTT WENTZ, an individual;
RAINAY YEE, an individual; MONTAGE

Case No.

COMPLAINT

(JURY TRIAL DEMANDED)

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1 SERVICES, INC., a California corporation;
2 VISTRA INTERNATIONAL EXPANSION
3 (USA) INC., fka RADIUS GGE (USA),
4 INC., fka HIGH STREET PARTNERS INC.,
5 a Maryland corporation; JULIE MURACO,
6 an individual; Praeditis Group LLC, a
7 Delaware limited liability company; THE
8 STRAUSS LAW FIRM, LLC, a South
9 Carolina limited liability company; PETER
10 STRAUSS, an individual; DIANA
11 KERSHAW, an individual; HERITAGE
12 BANK OF COMMERCE, a California
13 Corporation; CARSON TRAILER, INC., a
14 California corporation; DAVID ENDRES, an
15 individual; ALVAREZ & MARSAL
16 VALUATION SERVICES, LLC, a Delaware
17 limited liability company; BARRY
18 HACKER, an individual; MARSHAL &
19 STEVENS, INC.; MARCELO BERMUDEZ,
20 an individual; COHNREZNICK, LLP, a New
21 Jersey limited liability partnership; RADIUS
22 GGE (USA), INC., fka HIGH STREET
23 PARTNERS INC., a Maryland corporation;
24 PANDA BEAR INTERNATIONAL, LTD., a
25 Hong Kong corporation; PANDA SOLAR
26 SOLUTIONS LLC, a Nevada limited liability
27 corporation; DC SOLAR
28 INTERNATIONAL, INC., a Nevis
corporation; BAYSHORE SELECT
INSURANCE, a Bahamian Corporation;
CHAMPION SELECT INSURANCE, a
Bahamian Corporation; JPLM DYNASTY
TRUST, a Cook Island Trust; BILLIE JEAN
TRUST, a Cook Island Trust; SOUTHPAC
INTERNATIONAL, INC., a Cook Islands
Corporation, AHERN RENTALS INC., a
Nevada corporation,

Defendants.

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I. PRELIMINARY STATEMENT

Plaintiff's claims arise from two parallel fraud schemes that wrested over \$910 million from innocent purchasers, who thought they had purchased mobile solar energy generators which qualified for valid and significant tax benefits.

Scheme One: From 2011 to 2018, Defendants named below built and sold mobile solar generators ("MSGs") to purchasers. Purchasers bought the MSGs for \$150,000, with (a) a down payment of \$45,000, which supposedly qualified for alternative energy tax credits; and (b) a promissory note for the balance due over twenty years, during which purchasers could depreciate their MSGs on favorable tax terms. But, in reality, the Defendants' sale of MSGs proved a sham.

Scheme Two: The same purchasers were told that Defendants would generate substantial lease revenues from third parties, which would more than cover the balance purchasers owed on their promissory notes. But in reality, the Defendants' promised lease revenues proved to be a sham.

In reality, there was no true market for the MSGs sold to purchasers. Indeed, some purchasers paid for MSGs that were never manufactured. In reality, there was also no true market for the touted leases. The majority of the promised subleases never materialized. In reality, the Defendants perpetrated a fraud on the purchasers, by pretending to have sublease revenue, when in fact the purported sublease revenue was really cash from later purchasers that was transferred from DC Solar to DC Distribution, either directly or through the use of third parties. Defendants' touted sale and leasing transactions of MSGs were business failures that never made money. As a result, the purchasers grossly overpaid for the MSGs and the transactions may not qualify for the promised tax benefits promised. Further, the transactions never generated the promised lease income.

Defendants tried as long as possible to hide and conceal the true facts from purchasers. Among other things, Defendants lied about and tried to conceal that some MSGs sold to purchasers were never manufactured. The Defendants also lied about and tried to conceal that the MSGs failed to generate lease revenues. Among other things, the

1 Defendants moved money between companies in ways intended to disguise the fact that the
 2 MSG transactions were fraudulent failures.

3 Defendants fall into three main categories: Defendants who were core schemers,
 4 Defendants who were scheme aiders/abettors, and Defendants who facilitated hiding money
 5 and MSGs (or lack thereof).

6 Plaintiff, for its complaint against the Defendants, alleges as follows:

7 II. PARTIES

8 A. Plaintiff

9 1. Solarmore Management Services, Inc. (“**Solarmore**” or “**Plaintiff**”) is a
 10 California corporation authorized to do and doing business in California. Solarmore is
 11 owned and managed by Carl Jansen (“**Jansen**”).

12 2. Until December 12, 2019, Solarmore was the managing member of the
 13 following California limited liability companies, which are collectively referred to as the
 14 “**Funds**” or the “**Purchasers**.¹”

- 15 a. Solar Eclipse Investment Fund V, LLC
- 16 b. Solar Eclipse Investment Fund VI, LLC
- 17 c. Solar Eclipse Investment Fund VII, LLC
- 18 d. Solar Eclipse Investment Fund VIII, LLC
- 19 e. Solar Eclipse Investment Fund X, LLC
- 20 f. Solar Eclipse Investment Fund XI, LLC
- 21 g. Solar Eclipse Investment Fund XII, LLC
- 22 h. Solar Eclipse Investment Fund XIV, LLC
- 23 i. Solar Eclipse Investment Fund XV, LLC
- 24 j. Solar Eclipse Investment Fund XVI, LLC
- 25 k. Solar Eclipse Investment Fund XVII, LLC
- 26 l. Solar Eclipse Investment Fund XVIII, LLC
- 27 m. Solar Eclipse Investment Fund XIX, LLC
- 28 n. Solar Eclipse Investment Fund XXI, LLC

- 1 o. Solar Eclipse Investment Fund XXII, LLC
- 2 p. Solar Eclipse Investment Fund XXIII, LLC
- 3 q. Solar Eclipse Investment Fund XXIV, LLC
- 4 r. Solar Eclipse Investment Fund XXVI, LLC
- 5 s. Solar Eclipse Investment Fund XXVIII, LLC
- 6 t. Solar Eclipse Investment Fund XXXI, LLC

7 3. Solarmore is currently the 1% owner in each of the Funds except for Fund V
8 and Fund VI, in which Solarmore is the 95% owner.

9 4. The Funds are tax-equity investment funds permitted under the Internal
10 Revenue Code (the “**Code**”), created specifically for the purpose of owning MSGs.

11 5. Along with the managing member of the Funds, which was Solarmore up to
12 December 12, 2019, each Fund has a purchasing member or members (as further defined
13 below, the “**Purchasing Member**”), which provided the money to purchase the MSGs.

14 6. As of December 18, 2019, Solarmore consented to resignation as managing
15 member of the Funds.

16 B. Defendants

17 1) *The Core Defendants*

18 7. DC Solar Solutions, Inc. (on information and belief, dba DC Solar Solutions
19 MFG, Inc. dba DC Solar Solutions Manufacturing, Inc.) is a California corporation
20 headquartered in Benicia, California (“**DC Solar Solutions**”).

21 8. DC Solar Distribution, Inc. is a California corporation headquartered in
22 Benicia, California (“**DC Solar Distribution**”).

23 9. DC Solar Freedom, Inc. is a California corporation headquartered in Benicia,
24 California (“**DC Solar Freedom**”) (together with DC Solar Solutions and DC Solar
25 Distribution, “**DC Solar**”). The DC Solar entities are owned by Jeff Carpoff (“**Carpoff**”)
26 and Paulette Carpoff (together, the “**Carpoffs**”), except that Lauer, Muraco, and Roach also
27 owned equity in DC Solar Freedom.

28 10. The DC Solar entities are currently debtors in the jointly administered Chapter

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1 7 bankruptcy proceedings pending in the United States Bankruptcy Court, District of
 2 Nevada (“**Bankruptcy Court**”) under the lead case styled *In re Double Jump, Inc.*, Case
 3 No. 19-50102-gs (“**Bankruptcy Case**”). Christine W. Lovato (“**Lovato**” or “**Trustee**”) is
 4 the duly appointed Chapter 7 Trustee for the DC Solar entities’ bankruptcy estates (the
 5 “**Estates**”).

6 11. The Estates are named as Defendants in this Complaint only for purposes of
 7 determination of liability, or determination of forms of legal or equitable relief; pursuant to
 8 the court-approved stay relief stipulation between the Plaintiff and the Trustee in the
 9 Bankruptcy Case filed with the Bankruptcy Court on December 16, 2019. Any enforcement
 10 or collection actions against the Estates will occur within the context of the Bankruptcy
 11 Case.

12 12. Matthew and Lauren Carpoff (the “**Carpoff Children**”) are the adult children
 13 of Jeff and Paulette Carpoff and, upon information and belief, reside in California.

14 13. The Carpoff Children received funds and/or wages from DC Solar.

15 14. Upon information and belief, Lauren Carpoff was involved in the process of
 16 keeping track of VINs for MSGs that did not exist by assisting in the preparation of a master
 17 list of VINs.

18 15. Robert V. Amato is Paulette Carpoff’s brother. Robert worked for DC Solar.
 19 Robert’s wife is Priscilla Amato (together, the “**Amatos**”). The Amatos were also on DC
 20 Solar’s payroll, and, upon information and belief, Priscilla managed some of the real
 21 properties that were purchased with funds obtained by DC Solar from the Purchasers. Upon
 22 information and belief, the Amatos reside in California.

23 16. According to the DOJ Seizure document (*infra*), Robert V. Amato had planted
 24 GPS devices that were supposed to be attached to MSGs in locations so that it appeared that
 25 the MSGs existed at these locations on the GPS tracking program.

26 17. Robert Karmann (“**Karmann**”) is an accountant and, upon information and
 27 belief, resides in California. Karmann worked for DC Solar as controller or CFO from
 28 around 2014 through the companies’ closing.

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1 18. On December 12, 2019, Karmann was charged by Information with felony
 2 charges of conspiracy to commit an offense against the United States and securities fraud.
 3 See Case No. 2:19-cr-00222-JAM. Karmann has pled guilty.

4 19. Ronald J. Roach (“**Roach**”) is an accountant and, upon information and
 5 belief, resides in California. Roach runs a company known as Ronald J. Roach Accountancy
 6 Corp., and performed accounting services for, among others, DC Solar and Plaintiff.

7 20. On October 21, 2019, Roach was charged by Information with felony charges
 8 of conspiracy to commit an offense against the United States and securities fraud. On the
 9 same day, Joseph Bayliss was charged by Information with a felony charge of conspiracy
 10 to commit an offense against the United States. See Case No. 2:19-cr-00182-JAM. Roach
 11 and Bayliss pled guilty to those counts on October 22, 2019 and are set for sentencing on
 12 January 28, 2020. The charges and guilty pleas are related to their roles in the DC Solar
 13 fraud and enterprise.

14 21. Sebastian Jano (“**Jano**”) is a former employee of DC Solar, and, upon
 15 information and belief, resides in California.

16 22. Steve Wilde (“**Wilde**”) is an accountant the former controller of DC Solar
 17 Solutions and, upon information and belief, resides in California.

18 23. The Defendants listed in paragraphs 7 through 22, supra, shall hereinafter be
 19 referred to collectively as the “**Core Defendants**.”

20 24. Additional Defendants may be included as Core Defendants as investigation
 21 and discovery proceeds in this or related estates.

2) “*Scheme Aiders/ Abettors*”

23 25. Ryan Guidry (“**Guidry**”) was involved in operations of DC Solar from at least
 24 early 2012, and, upon information and belief, resides in California.

25 26. Upon information and belief, Guidry operated and/or administered the DC
 26 Solar sublease scheme which involved the misrepresentation of MSGs, and third party
 27 rentals.

28 27. Patrick Moore (“**Moore**”) is or was the 21% minority owner of Solarmore

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1 Investments, Inc. (“**Solarmore Investments**”), which was the managing member of the first
 2 funds purchasing MSGs from DC Solar. Upon information and belief, he resides in
 3 California.

4 28. According to the DOJ Seizure Document (*infra*), an informant tipster
 5 contacted the FBI and told the FBI that Moore admitted that he was part of a fraudulent
 6 scheme involving MSGs with the Carpooffs.

7 29. Halo Management Services LLC (“**Halo**”) is a Nevada limited liability
 8 company which is or was managed by Peter Roselli (“**Roselli**”). Halo was the managing
 9 member of the final funds purchasing MSGs from DC Solar.

10 30. Alvarez & Marsal Valuation Services, LLC is a Delaware limited liability
 11 company with its principal place of business in New York, NY (“**Alvarez & Marsal**”).

12 31. Alvarez & Marsal completed appraisals of MSGs for DC Solar validating the
 13 alleged value of the MSGs, which were presented to Purchasers.

14 32. Barry Hacker (“**Hacker**”) was a broker and sometimes senior officer at
 15 Marshall & Stevens, Inc. and, upon information and belief, resides in California.

16 33. Hacker brokered some MSG purchases, worked directly with Alvarez &
 17 Marsal in establishing value for the MSGs, promoted DC Solar as a potential borrower, and
 18 assisted in the Carpooffs activities to move assets and and/or operations to Nevis Island.

19 34. Upon information and belief, Marcelo Bermudez (“**Bermudez**”) is a broker
 20 at Shokunin, Inc. and, upon information and belief, resides in California who assisted
 21 Hacker and DC Solar.

22 35. Upon information and belief, Bermudez brokered some MSG purchases and
 23 may have worked directly with Alvarez & Marsal in establishing value representations for
 24 the MSGs.

25 36. CohnReznick LLP (“**CohnReznick**”) is New Jersey limited liability
 26 partnership and consulting firm with its principal place of business in New York, NY.

27 37. CohnReznick and its employees brokered some MSG purchases and worked
 28 directly with Alvarez & Marsal in establishing value for the MSGs.

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1 38. Scott Wentz (“**Wentz**”) is an accountant and another Defendant who resides
2 in California.

3 39. Wentz performed tax work, oversaw or participated in an audit or financial
4 compilation, and acted directly and helped DC Solar create international companies built to
5 keep assets and income outside of the United States.

6 40. Raina Yee (“**Yee**”) is an accountant and, upon information and belief, resides
7 in California. Yee was in charge of handling many of the various taxing authority audits of
8 DC Solar, the Funds, and/or the Carpoffs individually.

9 41. Vistra International Expansion (USA) Inc., fka Radius GGE (USA), Inc., fka
10 High Street Partners Inc., is a Maryland corporation headquartered in Massachusetts
11 (“**Vistra**”) that acquired Radius GGE (USA).

12 42. Radius GGE (USA), Inc., fka High Street Partners Inc., is a Maryland
13 corporation headquartered in Massachusetts (“**Radius**”).

14 43. Radius was acquired by Vistra on or about May 2018. Radius and Vistra
15 provided, among other things, tax work and other services to DC Solar, Solarmore, and the
16 Funds.

17 44. Montage Services, Inc. is a California corporation based in San Francisco
18 (“**Montage**”).

19 45. Some of Montage’s assets were acquired by Radius on or about June 2016
20 and entered into contractual agreements with Montage including the cooperative sharing of
21 employees and, facilities, and equipment.

22 46. Heritage Bank of Commerce (“**Heritage**”) is a California Corporation
23 primarily operating in California.

24 47. Diana Kershaw (“**Kershaw**”) is or was an officer or employee or former
25 employee of Heritage Bank and, upon information and belief, resides in California.

26 48. Upon information and belief, as an officer or employee Kershaw cooperated
27 with the Carpoffs to conceal or restrict information from Solarmore regarding its bank
28 accounts at Heritage.

49. Carson Trailer, Inc. (“**Carson**”) is a California corporation with its principal place of business in Gardena, California. Carson produced and sold the physical trailers upon which the MSGs were built.

50. Ahern Rentals, Inc. is a Nevada corporation headquartered in Las Vegas ("Ahern").

51. David Endres (“Endres”) is a former employee of Carson and DC Solar and, upon information and belief, resides in California.

52. Upon information and belief, Endres cooperated with the Carpoffs and DC Solar to provide VINs without corresponding trailers, and began working directly for DC Solar in the summer of 2018.

53. The Defendants listed in paragraphs 25 through 52, supra, shall hereinafter be referred to collectively as the "**Scheme Aiders/Abettors.**"

54. Additional Defendants may be included as Scheme Aiders/Abettors as investigation and discovery proceeds in this or related estates.

3) *Asset Hiders*

55. Julie Muraco (“**Muraco**”) is a financial advisor at Praeditis Group LLC, and, upon information and belief, resides in New York.

56. Muraco is or was an owner and on the board of directors of DC Solar Freedom and provided investment advice to the Carpooffs and/or DC Solar, as well as the direction of assets to offshore companies.

57. Praeditis Group LLC (“**Praeditis**”) is a Delaware limited liability company that was utilized by Muraco in her activities for DC Solar, some of the DC solar affiliates, and the Carpoffs in concealing and/or of assisting in the movement of assets.

58. The Strauss Law Firm (“**Strauss Firm**”) is a law firm located in Hilton Head, South Carolina. The Strauss Firm helped the Carpooffs and/or DC Solar to conceal or move assets.

59. Peter Strauss (“**Strauss**”) is an attorney and, upon information and belief, resides in South Carolina. Strauss is the principal/owner of the Strauss Firm.

60. Panda Bear International, Ltd. (“**Panda International**”) is an international

1 Hong Kong corporation. That was utilized in the movement of funds in and out of Hong
2 Kong and the China Bank and Trust.

3 61. Panda Solar Solutions LLC (“**Panda Solutions**”) is a Nevada limited liability
4 company, and entirely owned by the Carpoffs.

5 62. Upon information and belief, Panda International was formed by DC Solar
6 with assistance from Wentz supposedly for the purpose of purchasing batteries for MSGs,
7 to keep profits out of the United States and avoid U.S. income taxation.

8 63. Panda Solutions was the sole owner of Panda International.

9 64. DC Solar International, Inc. (“**DC Solar International**”) is an international
10 Nevis corporation. DC Solar International was formed by DC Solar with assistance from
11 Lauer, Strauss and Hacker, among others, to be the seller in certain sale-leaseback deals,
12 designed to move profits out of the United States and tax-free.

13 65. Bayshore Select Insurance is a Bahamian company, and acts as a captive
14 insurance company for DC Solar.

15 66. Champion Select Insurance is a Bahamian company, and acts as a captive
16 insurance company for DC Solar.

17 67. JPLM Dynasty Trust is a Cook Island trust administered in the Cook Islands
18 with Southpac Trust International, Inc. a Cook Island corporation as its Trustee.

19 68. Billie Jean Trust is a trust administered in the Cook Islands with Southpac
20 Trust International, Inc. a Cook Island corporation as its Trustee

21 69. The Defendants listed in paragraphs 55 through 68, *supra*, are described
22 collectively as the “**Asset Hiders**.”

23 70. The Core Defendants, Scheme Aiders/Abettors, and the Asset Hiders shall
24 hereinafter be referred to collectively as the “**Defendants**.”

25 71. Additional Defendants may be added to these categories as further
26 investigation or discovery proceed in this or related cases.

III. **JURISDICTION & VENUE**

72. This Court has subject-matter jurisdiction over Plaintiff's claims under 28 U.S.C. § 1331 and/or 28 U.S.C. § 1337, because the claims arise under the laws of the United States, including the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et. seq.*

73. This Court has supplemental jurisdiction over Plaintiff's claims arising out of state law pursuant to 28 U.S.C. § 1337, because those claims form part of the same case or controversy as Plaintiff's claims brought under federal law.

74. Plaintiff also asserts that jurisdiction is also present due to 28 U.S.C. 1337.

75. Personal jurisdiction comports with due process under the United States Constitution, the long-arm statutes of California, and the provisions of 18 U.S.C. § 1965(b) and (d).

76. Without limiting the generality of the foregoing, each Defendant (directly or through agents who were at the time acting with actual and/or apparent authority and within the scope of such authority) has:

- a. Transacted business in California;
- b. Contracted to supply or obtain services in California;
- c. Availed themselves intentionally of the benefits of doing business in California;
- d. Produced, promoted, sold, marketed, and/or distributed their products or services in California and, thereby, have purposefully profited from their access to markets in California;
- e. Caused tortious damage by act or omission in California;
- f. Caused tortious damage in California by acts or omissions committed outside California while (i) regularly doing business or soliciting business in California, and/or (ii) engaging in other persistent courses of conduct within California, and/or (iii) deriving substantial revenue from goods used or consumed or services rendered in California;

- 1 g. Committed acts and omissions which Defendants knew or should have known
 2 would cause damage (and, in fact, did cause damage) in California to Plaintiff
 3 while (i) regularly doing or soliciting business in California, and/or (ii)
 4 engaging in other persistent courses of conduct within California , and/or (iii)
 5 deriving substantial revenue from goods used or consumed or services
 6 rendered in California;
- 7 h. Engaged in a conspiracy with others doing business in California that caused
 8 tortious damage in California; and/or
- 9 i. Otherwise had the requisite minimum contacts with California such that,
 10 under the circumstances, it is fair and reasonable to require Defendants to
 11 come before this Court to defend this action.

12 77. Pursuant to 11 U.S.C. § 362 and to allow and Plaintiff to pursue its claims the
 13 Trustee has stipulated to relief from the automatic stay in the Bankruptcy Case to allow
 14 Plaintiff to liquidate the nature and amount of its claims against the Estates as a Defendant;
 15 however, Plaintiff may not proceed with any collection or other enforcement of any such
 16 determination except through the Bankruptcy case.

17 78. Venue is proper in this Court pursuant to 28 U.S.C. § 1331(b)(2) because a
 18 substantial part of the events or omissions giving rise to Plaintiff's claims occurred in
 19 Benicia, California, which is located in this judicial district.

20 IV. FACTUAL ALLEGATIONS

21 A. Introduction

22 79. This case involves two parallel fraud schemes which bilked purchasers out of
 23 nearly a billion dollars (together, the "Schemes").

24 80. The Carpooffs orchestrated the Schemes through companies they controlled
 25 (DC Solar), and the Carpooffs used the Schemes to enrich themselves personally at Plaintiff's
 26 expense.

27 81. The Defendants in this action each played an important role in the Schemes.

28 82. In 2011, the Carpooffs began the selling of MSGs through their privately-held

1 alternative energy company, DC Solar Solutions.

2 83. Through December 2018, DC Solar raised around \$910 million from sales of
 3 MSGs. DC Solar described the sales to interested parties as transactions that qualified for
 4 alternative energy tax credits.

5 84. To that end, Purchasers purchased MSGs from DC Solar Solutions and then
 6 immediately leased the MSGs to DC Solar Distribution.

7 85. DC Solar Distribution then supposedly sub-leased the MSGs to end-users.

8 86. The sale price for east MSG was \$150,000.

9 87. Purchasers typically made a 30% cash down payment to DC Solar Solutions
 10 on the MSGs, which were sold for \$150,000 apiece, because the associated tax credits were
 11 based upon 30% of the \$150,000 sales price.

12 88. This down payment was typically made by the Purchasing Member.
 13 Purchasers could immediately claim a dollar-for-dollar tax credit for the total they paid in
 14 cash to DC Solar Solutions per MSG.

15 89. Thereafter, the Purchasers could also claim depreciation for each MSG for
 16 five years.

17 90. These cumulative tax benefits were significant to Plaintiff and the
 18 Purchasers.

19 91. To complete the transactions, Purchasers paid the remaining amount owed to
 20 DC Solar Solutions for the MSGs by a carryback promissory note with a twenty (20) year
 21 term.

22 92. The Carpooffs and other Defendants told Purchasers that the cash to pay the
 23 note payments was supposed to be generated by lease revenues received by DC Solar
 24 Distribution from its supposed subleases of the MSGs to end users.

25 93. Additionally, the Purchasers (and the LLC members) were to receive some
 26 income from the subleases, over and above amounts needed to pay the carryback notes.

27 94. The sublease revenue payable to Purchasers from DC Solar Distribution was
 28 a critical component of the transactions, maximizing the tax benefits while minimizing debt

1 and expenses.

2 95. Without the mechanism, the alleged \$150,000 value of the MSGs would be
 3 difficult to sustain, thus jeopardizing the maximum value of the tax credits.

4 96. When the Funds were created, Solarmore owned 1% of each Fund, with the
 5 primary Purchasing Member owning the remaining 99% interest.

6 97. After five (5) years, which was the recapture period for the MSG tax credit,
 7 the equity ownership in the Funds would flip, with Solarmore owning 95% and the
 8 Purchasing Member owning 5%.

9 98. After the 5-year period, Solarmore had a call option to acquire the Purchasing
 10 Member's equity in the Funds for an amount that is significantly less than the amount of
 11 the Purchasing Member's downpayment.

12 99. DC Solar touted itself as a major player in its industry, with thousands of
 13 MSGs in the field, lucrative contracts with big customers yielding a track record of major
 14 revenues, and extensive experience in making and maintaining the MSGs, and finding
 15 customers to lease or purchase MSGs.

16 100. The sublease program and the major lease revenue promotion were a sham.

17 101. DC Solar manufactured and put into service far fewer MSGs than it claimed
 18 to Purchasers, and DC Solar made hardly any of its revenue from leasing MSGs.

19 102. In fact, DC Solar Solutions did not actually manufacture or receive about two-
 20 thirds of the MSGs that it purportedly sold to Purchasers.

21 103. Intensive efforts by Plaintiff to locate the MSGs have identified roughly 6,800
 22 of the approximately 18,400 MSGs that DC Solar sold to Purchasers.

23 104. Simply put, Purchasers paid over one billion dollars for MSGs that never
 24 existed or been delivered.

25 105. Further, legitimate lease income from actual end-users of the MSGs
 26 represented a tiny fraction -- less than 5% -- of DC Solar Distribution's alleged revenue.

27 106. The vast majority of DC Solar Distribution's revenue was actually comprised
 28 of money transferred from DC Solar Solutions derived from downpayments from later

1 purchasers.

2 107. In reality, the vast majority of DC Solar's money was used to manufacture,
3 place into service, or to maintain the thousands of MSGs that the DC Solar "sold" to
4 Purchasers.

5 108. Instead the Carpofts pilfered the money to cover-up losses by DC
6 Distribution, and to support a lavish lifestyle that included buying numerous luxury and
7 collector vehicles, a baseball team, a NASCAR Raceteam, expensive real estate within and
8 without the United States, and the use of private jets.

9 109. Generally, the Defendants perpetrated two fraud Schemes, the first relating to
10 the existence of MSGs.

11 110. The second relating to the movement of money from DC Solar to DC
12 Distribution to hide the failed sublease program.

13 111. A later third fraud scheme developed from the first two in the after-the-fact
14 effort to prop up bogus \$150,000 valuation of MSGs sold to Purchasers.

15 112. In the first Scheme, the Defendants falsely certified and represented to
16 Purchasers the existence of non-existent or undelivered MSGs.

17 113. Plaintiff relied on Defendants' certificates and representations, although the
18 claimed MSGs never existed or were delivered.

19 114. In the second Scheme, the Defendants tried to hide the lack of legitimate lease
20 revenue by moving money between and among different Defendants to conceal the failed
21 sublease program.

22 115. Defendants made representations to Plaintiff that the subleasing of the MSGs
23 started slowly, but then became robust, resulting in the sublease of most of the MSGs and
24 the generation of significant rental revenue.

25 116. Defendants showed Plaintiff a few leases for a large number of MSGs to third
26 parties.

27 117. Then, Defendants represented to Plaintiff that Defendants had many other-
28 such leases that produced significant revenue for DC Distribution.

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Reno, Nevada 89501

1 118. In reality, the overwhelming majority of DC Distribution's supposed
2 "revenue" consisted of cash transfers from DC Solar Solutions to DC Solar Distribution
3 derived from initial down payments of later Purchasers.

4 119. Between March 2011 and December 18, 2019, approximately thirty-four (34)
5 Funds entered into transactions with DC Solar Solutions to purchase MSGs, resulting in the
6 deposit of approximately \$759,000,000 by interstate transfer into the Funds' bank accounts
7 by Purchasing Members for Defendants' MSG transactions.

8 120. Other Purchasers transferred approximately \$136,000,000 to DC Solar
9 Solutions as part of related transactions for the purchase and lease of MSGs.

10 121. In total, DC Solar Solutions closed transactions with Funds and others
11 involving approximately 18,400 MSGs at approximately \$2.7 billion in purported value.

12 122. These deals had face values of more than \$2.7 billion because Purchasers
13 financed approximately 70 percent of the amount of the MSGs' purchase price through
14 promissory notes.

15 123. DC Solar, directly and indirectly, solicited purchasers through brokers and
16 salespeople using various methods, including email, conference calls and in-person
17 meetings. DC Solar offered and sold Fund Contracts (defined below) through interstate
18 commerce to purchasers across the United States.

19 124. The Core Defendants were in the process of attempting to close additional
20 large transactions by the end of 2018 or in early 2019 but were stopped by the federal
21 government's raid and seizures.

B. The Creation of the MSGs

23 125. Carpooff started DC Solar Solutions in or about 2009, when he began
24 designing and creating the first MSGs.

25 126. Carpoft wholly owned the company after the departure of John Messer, a
26 former 21% owner.

27 127. A typical MSG consisted of photovoltaic (“PV”) modules, PV inverters,
28 batteries, a trailer and other miscellaneous ancillary components.

1 128. According to an appraisal of 1,140 MSGs dated August 19, 2015 (“**GEICO**
 2 **Appraisal**”) by Alvarez & Marsal, which is nearly identical to the other Appraisals (defined
 3 below) provided to all of the Funds, DC Solar Solutions “is a clean energy company that
 4 designs, manufactures and deploys solar energy solutions which are eligible for federal,
 5 state and local renewable energy incentives.”

6 129. Alvarez & Marshall initially was requested to produce retroactive appraisals
 7 to bolster an earlier appraisal by a less prestigious appraiser.

8 130. The GEICO Appraisal describes the MSGs as DC Solar Solutions’ “signature
 9 product... available in 5, 10, 15, 20 and 25.5 kW power capacities... in use throughout the
 10 United States where an MSG is a more desirable alternative than a diesel-powered
 11 generator. MSGs are capable of operating anywhere they can be transported...”

12 131. The GEICO Appraisal further describes the MSGs as follows: “The MSGs
 13 utilize two PV arrays of Talesun Solar USA panels made up of a total of ten PV modules.

14 132. The PV modules are framed or attached together by struts in a panel structure.
 15 Each panel structure contains five solar modules which are about 16 feet in length.

16 133. The PV Arrays are grouped so that the panels can be deployed at multiple
 17 angles for maximum exposure to the Sun.

18 134. The MSGs also contained a battery backup system, a battery management
 19 system and a charge controller.

20 135. At the beginning, the cost of production for one MSG was purportedly
 21 approximately \$78,000, however this “cost” was comprised largely of overhead and labor
 22 costs.

23 C. The First Funds

24 136. In or about 2010, DC Solar Solutions created the first fund to own MSGs and
 25 solicit MSG purchases for tax benefits.

26 137. The early funds created by the Carpooffs to own MSGs were managed by
 27 Solarmore Investments, an entity controlled by Carpooff and owned by Carpooff and Moore.

28 138. Purchasers typically made a 30% down payment to DC Solar Solutions on the

MSGs, which were sold for \$150,000 apiece.

139. Purchasers could then immediately claim a dollar-for-dollar tax credit based upon 30% of the \$150,000 price. Purchasers also claim depreciation for each MSG for five (5) years. These tax benefits were significant and amounted in hundreds of millions of dollars.

D. The Beginning of the Funds

140. Solarmore was formed in 2013 by Lauer and was initially owned 79% by Carpooff and 21% by Jansen.

141. Currently, Jansen owns 100% of Solarmore.

142. Solarmore was formed to manage certain of the Funds who purchased MSGs.

143. As compensation for Solarmore's management of certain Funds, Defendants promised a payment equal to 1% of the tax credits for the Funds, and the later ability to indirectly own through Solarmore entity 95% of the MSGs after the ownership of the Funds "flip" after 5 years.

144. Defendants represented to Jansen that the MSGs would retain significant value after 5 years that exceeded the loan balance still owed to DC Solar at such time.

145. Nixon Peabody LLP (“Nixon”), is a law firm headquartered in New York and operating in additional states and issued tax opinion letters to Plaintiff Purchasers, and the Funds opining to the valid tax benefits to Purchasers of MSGs.

E. The Funds' Basic Structure

146. The basic structure of the MSG sales was as follows: DC Solar offered Purchase Agreements and Equipment Leases (defined below), under which Purchasers paid to purchase MSGs from DC Solar Solutions, while in turn simultaneously leasing them to DC Solar Distribution.

147. DC Solar Distribution then promised that it would arrange to sub-lease the MSGs to end-users.

148. Purchasers executed a standard package of agreements, including: (i) a Limited Liability Company Agreement (“**LLC Agreement**”); (ii) a Solar Equipment

1 Purchase Agreement (“**Purchase Agreement**”); (iii) a Secured Promissory Note
 2 (“**Promissory Note**”); and (iv) a Mobile Solar Equipment Lease (“**Equipment Lease**”)
 3 (together the “**Fund Contracts**”).

4 149. The documents were executed at or around the same time, with Jeff Carpoff
 5 signing the Purchase Agreements on behalf of DC Solar Solutions and Paulette Carpoff
 6 typically signing the Equipment Leases on behalf of DC Solar Distribution.

7 150. While certain contracts had minor variations in wording, all of the Fund
 8 Contracts largely contained the same substantive terms.

9 151. Under the terms of the LLC Agreements, an investor became the Purchasing
 10 Member of an individual Fund, a special purpose LLC entity created specifically for the
 11 purchase of MSGs.

12 152. The Fund then purchased MSGs from DC Solar Solutions at a price of
 13 \$150,000 per MSG under a Purchase Agreement.

14 153. The Purchase Agreement specified the total number of MSGs being
 15 purchased in that specific transaction, as well as the total purchase price.

16 154. An Exhibit to the Purchase Agreement contained a blank space for the
 17 Vehicle Identification Numbers (“**VINs**”) for the MSGs or stated that “VIN for each
 18 Generator [MSG] to be Supplied at Delivery.”

19 155. In exchange for the specified payment, DC Solar Solutions agreed to deliver
 20 the MSGs by a certain date or dates and warranted “to Buyer that all Equipment shall be in
 21 good working order in conformity with the Specifications for a period” of five or ten years.

22 156. The delivery dates for tranches of MSGs specified in the Purchase
 23 Agreements were occasionally scheduled in stages.

24 157. Likewise, the Purchase Agreements dictated that payments would be due to
 25 DC Solar Solutions in stages according to a schedule in part dictated by capital contributions
 26 being made by the Purchasing Member under the terms of the LLC Agreement.

27 158. Those capital contributions were contingent on Purchasers receiving
 28 confirmation that the Generators were “Placed in Service” as evidenced by an “IE

1 [Independent Engineer] Certificate.”

2 159. Purchasing Members generally contributed about thirty percent (30%) of the
 3 purchase price in cash and financed the balance pursuant to a Promissory Note or Notes
 4 executed by the Fund in favor of DC Solar Solutions.

5 160. The Promissory Note was an exhibit to the Purchase Agreement.

6 161. The physical location of all of The Promissory Notes is currently under
 7 investigation.

8 162. DC Solar told Purchasers, and arranged for a tax opinion letter from Nixon
 9 confirming, that the MSGs qualified for the “Energy Credit” under Internal Revenue Code
 10 § 48.

11 163. IRS Code § 48 allows for a thirty percent tax credit for certain energy-related
 12 investments (hereafter, the “**Tax Credit**” or the “**Credit**”).

13 164. Thus, Purchasing Members expected to be able to take a Tax Credit for
 14 roughly the same amount as their cash contribution to the Fund.

15 165. Under the Fund Contracts, the MSG business was left entirely to DC Solar.

16 166. At the same time the Funds executed the Purchase Agreements with DC Solar
 17 Solutions, the Funds also executed Equipment Leases with DC Solar Distribution for at
 18 least the first batch of MSGs being purchased.

19 167. Depending on the size of the transaction, as additional tranches of MSGs were
 20 manufactured, additional Equipment Leases were executed.

21 168. Under the Equipment Leases, the Funds leased their MSGs to DC Solar
 22 Distribution for terms ranging up to 120 months.

23 169. The Equipment Leases provided that DC Solar Distribution shall use “the
 24 Solar Equipment in a careful and proper manner” and “shall comply with all laws,
 25 regulations and ordinances.”

26 170. Moreover, the Equipment Leases stated that DC Solar Distribution shall be
 27 “solely responsible for the maintenance and repair of the Solar Equipment” and “shall
 28 ensure the Solar Equipment is operational and capable of producing solar energy at all

1 times.”

2 171. The Equipment Leases required DC Solar Distribution to “obtain, maintain
3 and keep” insurance coverage on the MSGs in the amount of the replacement cost as well
4 as “liability insurance.”

5 172. In addition, the Equipment Leases required DC Solar Distribution to
6 “promptly pay when due, all license fees, registration fees, sales taxes, use and property
7 taxes, assessments, charges and other taxes” imposed upon the MSGs.

8 173. The Equipment Leases further provided for a set amount of “Base Rent” to
9 be paid to the Fund in advance in monthly installments for the term of the lease as well as
10 payment to the Fund of “Additional Rent” or “Variable Rent” to the extent DC Solar
11 Distribution received revenue from subleasing the MSGs in excess of a certain amount.

12 174. The amount of additional or variable rent due to the Fund varied depending
13 on the deal and the calculation was specified in the Equipment Lease.

14 175. The Fund Contracts were structured such that there was a flow of money
15 between the Funds and DC Solar, all of which, in a legitimate business model, would have
16 been contingent on the MSGs generating significant sub-lease revenue from legitimate end-
17 users.

18 176. DC Solar Distribution owed monthly lease payments to the Funds purportedly
19 to be paid with the sub-lease revenue it received from third-party customers.

20 177. The Funds would then use the lease payments they received from DC Solar
21 Distribution under the terms of the Equipment Leases to make monthly payments due to
22 DC Solar Solutions under the terms of the Promissory Notes.

23 178. Purchasers expected several benefits under the arrangement, including the
24 30% Tax Credit and the ability to claim significant depreciation on the MSGs.

25 179. In addition, Purchasers were entitled to receive some cash distributions from
26 the Funds.

27 180. In general, the LLC Agreements stated that “Distributable Cash,” defined as
28 the amount of cash from lease revenue remaining after loan payments and operating

1 expenses, would be paid out to Purchasers on an annual basis.

2 181. Specifically, Purchasers expected to, and promised by DC Solar and other
3 Defendants that they would, profit from the Fund Contracts due to Tax Credits, depreciation
4 on the MSGs, lease payments, and ownership of the MSGs.

5 182. Purchasers thus played an entirely passive role under the DC designed
6 structure.

7 183. The success of the venture, and thus the profits to Purchasers and DC Solar,
8 turned entirely on the efforts of DC Solar to make, maintain, market, and lease the MSGs.

9 184. DC Solar marketed itself as having extensive experience and capabilities in
10 the renewable energy field and in executing successful transactions for purchasers.

11 185. For example, pitch-books for Purchasers, which were prepared by, among
12 others, Hacker, Bermudez and CohnReznick, and other brokers working on behalf of DC
13 Solar using information provided by DC Solar, emphasized that DC Solar had thousands of
14 MSGs deployed and manufacturing capabilities of 900 MSGs per month.

15 186. These brokers and other parties highlighted that DC Solar had closed many
16 prior funds with “headline” or “notable” Purchasing Members, including funds with fair
17 market values near or over \$100 million, and that the “performance of each of the funds
18 remains in good standing.”

19 187. In addition, the materials claimed DC Solar had “customer relationships with
20 leading companies in the telecommunications, entertainment and construction industries”
21 and provided case studies of the established leasing arrangements with many of those
22 customers.

23 188. Finally, certain of the pitch-books provided a “Summary of Investor Returns”
24 with estimated internal rates of return ranging from 40 to as high as 50 percent.

25 189. One such lease touted, was a lease with Ahern Rentals, which purchasers were
26 not told was backstopped by an agreement from DC Solar Solutions in favor of Ahern.

27 190. For example, in an email dated July 11, 2018 from Bermudez to Karmann,
28 Hacker and Carpooff, an attached lease schedule claims a 94.31% MSG “utilization rate”,

1 with 12,164 units allegedly being subleased as of December 31, 2017 out of 12,898 Fund-
 2 owned MSGs.

3 191. By design, Purchasers never physically took possession of the MSGs that they
 4 purchased because the MSGs were leased to DC Solar Distribution upon purportedly being
 5 placed in service.

6 192. Pursuant to the terms of the Purchase Agreements and LLC Agreements,
 7 Purchasers made payments to DC Solar Solutions for the MSGs in installments after
 8 receiving proof that the MSGs had been placed in service as evidenced by the delivery of
 9 the “IE Certificate.”

10 193. The LLC Agreements defined “IE Certificate” as “a certificate to be issued
 11 by the Independent Engineer” with respect to the MSGs “upon achievement of Placement
 12 in Service.” Beginning in 2014, the LLC Agreements further stated that “‘Independent
 13 Engineer’ means ‘Joseph Bayliss of Bayliss Innovative Services.’”

14 194. Jeff Carpoft arranged for Bayliss and his firm to serve as the “Independent
 15 Engineer.”

16 195. The Bayliss arrangement deceived Purchasers, because Bayliss was neither
 17 independent nor an engineer.

18 196. While Bayliss holds general contractor and electrical licenses from the State
 19 of California, he was never a licensed engineer.

20 197. Bayliss has known Jeff Carpoft and Paulette Carpoft since high school.

21 198. In fact, the Company and Jeff Carpoft hired Bayliss to perform various
 22 projects for DC Solar and other businesses owned by Jeff Carpoft.

23 199. DC Solar purported to sell more than 18,400 MSGs from its inception.

24 200. Bayliss executed IE Certificates, titled “IE Commissioning Reports,” for
 25 nearly all of the sold MSGs from 2014 through 2018.

26 201. In thousands of instances, Bayliss admittedly signed IE Commissioning
 27 Reports for MSGs without inspecting them, and without any basis for making the
 28 representations in the IE Certificates.

1 202. Further, Purchasers routinely requested financial statements from DC Solar
2 Distribution and DC Solar Solutions before purchasing MSGs.

3 203. In response, DC Solar and Defendants often provided Purchasers with
4 putative financial statements.

5 204. Roach issued "Accountants' Compilation Reports" for DC Solar Distribution
6 and DC Solar Solutions covering various periods between 2011 through July 2018.

7 205. Roach signed these reports on the letterhead of his firm, Ronald J. Roach
8 Accountancy Corporation.

9 206. The financial statements accompanying Roach's compilation reports included
10 a statement of income in each.

11 207. Roach prepared these reports at the direction of the Carpoffs and provided
12 them to Lauer, despite knowing of the circular flow of funds between DC Solar Solutions
13 and DC Solar Distribution.

F. General Background - Defendants Causing or Contributing to Plaintiff's Injuries

16 208. On information and belief, Wilde knew or should have known of the financial failure
17 of the sublease program and the lack of existence or continued production of MSGs. On information
18 and belief, Wilde assisted in presenting false or misleading information to Plaintiff and others or
19 concealing information from Plaintiff and others.

20 209. On information and belief, Guidry knew or should have known of the financial
21 failure of the sublease program and the lack of existence or continued production of MSGs. On
22 information and belief, Guidry assisted in presenting false or misleading information to Plaintiff
23 and others or concealing information from Plaintiff and others.

210. On information and belief, Moore knew of the substantial problems with DC Solar
and acted as a party who collected money for the Carpofts from difficult individuals.

26 211. Montage, Wentz, Yee, on information and belief, performed tax work, oversaw or
27 participated in an audit or financial compilation, and acted directly and helped DC Solar create
28 international companies built to keep assets and income outside of the United States.

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1 212. Upon information and belief, among other work, Montage audits of DC Solar, the
2 Funds, and/or the Carpoffs were performed by Montage through its employees and the employees
3 of Radius.

4 213. Upon information and belief, Montage, Wentz, Yee, Radius, and Vistra knew or
5 should have known of misrepresentations regarding the financial status of DC Solar.

6 214. Montage, Wentz, Yee, Radius, and Vistra, however, performed tax work and audits
7 or financial compilations for DC Solar and provided that information to Plaintiff and others with
8 knowledge that it would be relied upon.

9 215. At some point Yee, Wentz, and Montage learned of significant transfers of
10 cash from DC Solar Solutions to DC Solar Distribution in multiple years as part of
11 preparation of certified audited financial statements for DC Solar Solutions.

12 216. Despite this information, the certified audited financial statements for DC
13 Solar Solutions did not reflect or accurately reflect these payments

14 217. On information and belief, Ahern assisted DC Solar in the creation of an invalid or
15 improper sublease that it knew or should have known would be presented to Plaintiff and others to
16 rely upon.

17 218. Upon information and belief, Carson only made approximately 6,800 trailers, but
18 gave DC Solar over 17,000 VINs used by DC Solar to falsify commissioning reports with non-
19 existent MSGs and corresponding VINs, even after it became clear that DC Solar had no intent to
20 acquire more trailers.

21 219. On information and belief, Carson knew or should have known that DC Solar was
22 providing the VINs to Plaintiff and other purchasers and that Plaintiff and other purchasers would
23 rely upon the existence of a VIN to establish the existence of an MSG.

24 220. On information and belief, Endres knew or should have known that DC Solar was
25 providing the VINs to Plaintiff and other purchasers and that Plaintiff and other purchasers would
26 rely upon the existence of a VIN to establish the existence of an MSG.

27 221. On information and belief, Alvarez & Marsal did not have a sufficient basis upon
28 which to base its appraisals, the appraisals were negligently prepared, the appraisals were not

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1 properly adjusted over time, and the appraisals did not meet professional and industry standards.

2 222. Halo, despite being the managing member of multiple funds, took no actions to
3 protect or preserve the MSGs owned by the funds it was managing.

4 223. Plaintiff, at the request of members in Halo-managed funds and at its own expense,
5 assisted by advancing money or services relating to the Halo-managed funds and Halo has not
6 provided compensation to Plaintiff for those efforts.

7 **G. The First Sign of Trouble (the Audits) & the Appraisals**

8 224. Starting as early as 2013, red flags began emerging in the DC operations.

9 225. DC Solar, the Funds and the Carpofts individually became subject of audits
10 by the Internal Revenue Service (“IRS”) and the State of California regarding income, sales
11 and franchise taxes.

12 226. As of 2018, the potential tax liability with respect to these audits was hundreds
13 of millions of dollars.

14 227. Specifically, the IRS questioned the \$150,000 valuation of each MSG.

15 228. The IRS also determined that DC Solar was not properly recognizing the
16 income from the “sale” of the MSGs.

17 229. On information and belief, DC Solar only paid taxes on the 30% down
18 payment received from the Purchasers for the MSGs. DC Solar did not pay taxes on the
19 Promissory Notes held by DC Solar Solutions.

20 230. Over the course of the IRS audit, the aggregate amount owed on the notes
21 held by DC Solar Solutions was approximately \$1.2 billion, resulting in a significant tax
22 liability to the Carpofts.

23 231. DC Solar was taxable as an S corporation for federal income tax purposes.

24 232. This corporation status meant that DC Solar did not pay federal income tax,
25 but rather passed through the taxable income to the Carpofts as shareholders of DC Solar.

26 233. The IRS was contesting the \$150,000 valuation of the MSGs in at least 5
27 separate federal income tax audits of tax equity funds.

28 234. To support the \$150,000 claimed value of each MSG, DC Solar retained

1 Alvarez & Marsal, a well-known valuation firm, to create appraisals (collectively, the
 2 “**Appraisals**”) validating that price.

3 235. The brokers sometimes worked directly with Alvarez & Marsal in producing
 4 a final draft of the Appraisals.

5 236. The Appraisals were based on the Carpoffs’ and other Core Defendants’
 6 representations of a 95% sublease utilization rate, average rents of \$700-\$1000/month per
 7 unit, and projections for additional long term leases and related future cash flow.

8 237. Alvarez and Marsal continued to use its initial valuation of the MSGs for
 9 years, even after learning of the IRS fund audits, without following up on the accuracy of
 10 the Appraisals or the underlying data that purportedly supported the Appraisals.

11 238. Upon information and belief, Alvarez and Marsal never changed its \$150,000
 12 initial valuation to include new information about actual leases, nor did Alvarez and Marsal
 13 investigate to determine if the valuation should change for a number of reasons including
 14 obsolete technology.

15 239. Upon information and belief, Alvarez and Marsal never received actual copies
 16 of the subleases, and did not investigate if alleged lease revenue was legitimate or even
 17 existed.

18 240. Upon information and belief, Alvarez & Marsal never questioned the
 19 exorbitant markup of the MSGs over the cost of production.

20 241. Upon information and belief, DC Solar initially retained Montage, Wentz and
 21 Yee in 2013, to respond to the California sales tax audits.

22 242. Wentz and Yee learned about the structure whereby DC Distribution was
 23 supposed to sublease the MSGs as part of representing DC Solar with respect to the
 24 California sales tax audit.

25 243. Wentz and Yee sent information regarding the subleases to the State of
 26 California demonstrating small amounts of sublease revenue.

27 244. Wentz and Yee expanded their workload beyond the California sales tax
 28 audits by providing certified audited financial statements for DC Solar, Solarmore, and

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1 certain Funds.

2 245. Montage was later acquired by Radius in 2016, and Radius in turn acquired
3 by Vistra.

4 246. Plaintiff also retained Wentz and Montage to complete tax returns and
5 certified audited financial statements.

6 247. Upon information and belief, in cooperation with the Carpoffs and DC Solar,
7 Montage, and Wentz concealed requested financial and tax documents and information
8 from Solarmore.

9 248. Some key employees of Montage or “Legacy Montage” worked for both
10 Montage, and Radius or Vistra, simultaneously during 2016 through 2018.

11 **H. The Phaseout of Solarmore**

12 249. Halo was created in 2016, with Roselli as the managing member.

13 250. Upon information and belief, Roselli was or is a personal friend of the
14 Carpoffs, and had a previous business relationship with Paulette Carpoff.

15 251. During 2016 and 2017, as some of the Funds began nearing the five-year
16 equity flip benchmark, Jansen, believing Plaintiff would soon be the majority member of
17 those Funds and effective owner of thousands of MSGs, began asking questions of the
18 Carpoffs and other Core Defendants regarding potential tax implications and other
19 ownership-related effects on Plaintiff.

20 252. Further, Jansen attempted to ask Kershaw questions on behalf of Plaintiff
21 about the Plaintiff’s bank account at Heritage Bank. Upon information and belief, Kershaw
22 acting in her capacity as an officer of Heritage Bank would not give the requested
23 information to Jansen, and would instead email the Carpoffs informing them of Jansen’s
24 contact and questions even though Jansen was the primary account signer and party.

25 253. Soon thereafter, in or about 2017, rather than reveal the ongoing Schemes to
26 Jansen and Plaintiff, the Carpoffs stopped using Solarmore and instead used Halo as the
27 manager of funds created from that point forward from late 2016 through 2018.

28

I. The Collapse of DC Solar

254. As early as mid-2016, the Core Defendants knew that the sublease program was a huge financial failure, and that DC Solar had a massive cash shortfall from lack of real lease revenues.

255. Lease revenue from end-users of the MSGs was critical to the legitimacy of the businesses of DC Solar Solutions and DC Solar Distribution because it was supposed to provide the money that DC Solar Distribution needed to make lease payments to the Funds, and those payments were critical to the Funds' ability to make payments on the Promissory Notes to DC Solar Solutions.

256. Although DC Solar Distribution purported to be earning millions each month in lease revenue from end-users of the MSGs, bank records demonstrate that DC Solar Distribution generated minimal lease revenue from subleases to end-users.

257. To further illustrate, in an email dated July 18, 2016 from Roach to Carpoff and Lauer, Roach attached five spreadsheets summarizing the sublease activity for DC Solar from 2012-2015.

258. The 2016 Roach documents reflect sublease revenue of \$138,138.64 for 2012, \$278,179.74 for 2013, \$321,717.06 for 2014, and \$1,419,570.80 for 2015, for a grand total over four years of \$2,157,606.24.

259. The actual cash requirement from the subleases of the MSGs under DC Solar's lease program over that four-year time period – stated as a percentage of promised utilization-- was a dismal 3.78%.

260. This failure of the sublease program also endangered the touted tax benefits of the Defendants' MSG transactions.

261. This failure of the sublease program also invalidated the stated appraisal value of MSGs for ongoing or new purchaser transactions.

262. In an email dated March 2, 2017 from Roach to Lauer and various individuals at Nixon and major accounting firms Hays, Foley and Deloitte, provides the same information for 2013-2015 , adding the \$2,071,664.85 in sublease revenues for 2016.

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1 263. Roach also stated in his 2017 email that following amounts were paid by DC
2 Solar Solutions to DC Solar Distribution on a “re-rent” basis for each of those years:

3 2013 - \$1,595,370

4 2014 - \$13,975,770

5 2015 - \$30,562,024

6 2016 - \$61,545,737

7 264. On information and belief, the Core Defendants knew about the foregoing.

8 265. Over the time periods, the Core Defendants began taking drastic measures to
9 conceal the financial failure of the MSG transactions, and to conceal the fact that the Core
10 Defendants had masked that financial failure by moving money received from new
11 purchasers from DC Solutions to DC Distribution, and falsely representing the new
12 purchasers’ money as revenues received from subleases of MSGs to end users.

13 266. The Core Defendants created fake subleases, circular subleases, and dummy
14 third party sublessors to make the sublease program appear legitimate.

15 267. To hide the fact that insufficient money was coming in from subleases, the
16 Core Defendants circulated new monies received by DC Solar Solutions to DC Solar
17 Distribution, which then paid the Funds with alleged “lease revenues.” Most of the supposed
18 lease revenue paid to the Funds were actually recirculations of later down payments paid
19 by later Purchasing Members under later Purchase Agreements.

20 268. For example, during the period of January 2013 through December 2018, a
21 total of about \$409,930,000 was deposited to DC Solar *Distribution*’s bank accounts.

22 269. Of that amount, approximately \$383,347,000 -- or 93.5% -- consisted of
23 transfers from DC Solar *Solutions*’ bank accounts. And, another \$8,268,000 -- or 2.0% --
24 consisted of transfers from the bank accounts of different Funds.

25 270. At most, \$18,316,000 -- or 4.5% -- of the deposits to DC Solar Distribution’s
26 bank accounts during the time period represented sub-lease payments from end-users of the
27 MSGs.

28 271. Yet, during this period, DC Solar Distribution paid about \$347,800,000 to

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1 various Funds and purchasers, mostly of which took the form of circular “lease payments”
2 owed by DC Solar Distribution under the operative Equipment Leases.

3 272. Accordingly, DC Solar Distribution’s payments were not funded by
4 legitimate sub-lease revenue, but instead by investor funds cycled through DC Solar
5 Solutions.

6 273. Wentz and Yee were informed of these large payments prior to the completion
7 of the 2017 certified audited financial statements, and on information and belief as early as
8 2016.

9 274. The Core Defendants prepared and disseminated false financial statements
10 and compilation reports falsely stating that DC Solar Distribution generated hundreds of
11 millions of dollars of revenues in “Rental Income.”

12 275. In reality, the overwhelming majority of purported “Rental Income” consisted
13 of intercompany transfers from DC Solar Solutions.

14 276. The cash infusions of hundreds of millions of dollars from DC Solar Solutions
15 to DC Solar Distribution were hidden in the “Direct Costs” category of DC Solar Solutions’
16 income statements.

17 277. These putative Direct Cost payments had nothing to do with the costs of
18 manufacturing the MSGs.

19 278. The Core Defendants began storing and stashing away MSGs they failed to
20 sublease, which were stacking up, in some cases incurring significant storage costs.

21 279. The Core Defendants started giving away MSGs for free through DC Solar
22 Freedom and essentially using the MSGs as advertising props in an attempt to attract
23 attention.

24 280. Starting in 2016, DC Solar stopped buying and manufacturing MSGs
25 altogether.

26 281. In fact, DC Solar never manufactured or received delivery of the majority of
27 the MSGs that it “sold” to Purchasers.

28 282. Recent intensive efforts by Plaintiff to locate those MSGs turned up roughly

1 6,800 MSGs of the approximately 18,400 MSGs for which Bayliss provided IE
 2 Commissioning Reports.

3 283. The Core Defendants began putting new VIN numbers on old units, or
 4 misrepresenting VINs in order to conceal the fact that new MSGs were not being produced
 5 and older units were never subleased.

6 284. The VIN subterfuge was made possible by Carson's willingness to provide
 7 DC Solar Solutions with reserved VINs before building the associated trailers reserved for
 8 the VINs.

9 285. At times, DC Solar Solutions sold the same MSG to different Purchasers, but
 10 with changed VINs, with no awareness of either the old or new Purchasers.

11 286. The Core Defendants made false representations to Plaintiff and others
 12 regarding production of MSGs, alleged lease revenue, and other lies or misrepresentations
 13 as part of the Schemes.

14 287. The Core Defendants knew when making those representations that MSGs
 15 were no longer being produced or received, and that the Core Defendants did not intend to
 16 produce or receive MSGs on any timely basis.

17 288. The Core Defendants directed each other, and others including but not limited
 18 to the other Defendants, to lie and present false information to perpetuate and/or cover up
 19 the Schemes.

20 289. On or about 2017, SolarSense, a solar energy provider, began negotiations to
 21 buy MSGs from DC Solar Solutions.

22 290. However, rather than taking a promissory note carryback note to DC Solar
 23 Solutions (as was the usual structure for most of the DC Solar tax equity transactions)-
 24 SolarSense attempted to arrange financing for its purchase of MSGs through KeyBank.

25 291. During KeyBank's due diligence review for the deal, KeyBank requested,
 26 among other things, a list of end-user/sublessees, pro forma financials for DC Solar
 27 Distribution, samples of subleases, and DC Solar Distribution's' QuickBooks.

28 292. On information and belief, KeyBank began to suspect, after closing, the

1 claimed subleases and claimed sublease revenues were false.

2 293. On information and belief, Carpoft and Lauer instructed Jano, a former
3 employee of DC Solar who was putting together the SolarSense/Keybank deal, to shut down
4 the deal, knowing that the KeyBank's requested data would reveal the fraud underlying the
5 Schemes.

6 294. On information and belief, SolarSense and KeyBank closed their transaction
7 in reliance on Defendants representation and promise of information to be delivered.

8 295. Jano subsequently resigned his employment with DC Solar, and sent a letter
9 through counsel to the Carpofts in February 2018, providing specific details about the
10 Schemes, and threatening to expose the Schemes if he was not paid \$5 million.

11 296. In December 2018, law enforcement agents executed federal search warrants
12 at DC Solar Solutions' headquarters and other locations, seizing over \$60 million in assets.

13 297. On January 30, 2019, the first DC Solar company filed for Chapter 11
14 bankruptcy.

15 298. Thereafter, additional DC Solar-affiliated companies filed for Chapter 11
16 bankruptcy.

17 299. Subsequently all of the DC Solar Chapter 11 cases were converted to Chapter
18 7 Liquidation Bankruptcy cases.

19 **J. The Carpofts' Preparations for Escape**

20 300. In or about 2018, the Carpofts in various ways began withdrawing large
21 amounts of money from DC Solar, including a payment of \$20,000,000 to Panda.

22 301. In May 2018, the Carpofts held extensive discussion with Strauss about
23 obtaining citizenship in Nevis Island, a well-known asset shelter in the Caribbean.

24 302. Later in August 2018 the Carpofts bought property in Nevis for \$5 million
25 and used DC Solar International, a Nevis affiliation to undertake a sale leaseback
26 transaction.

27 303. Upon information and belief, The Carpofts also started making plans to flee
28 the United States if necessary which included an expedited renewal of their passports.

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1 304. Strauss, the Strauss Firm, Muraco, and Praeditis, assisted in the creation of
 2 the Nevis transactions and had already created offshore accounts, offshore trusts, and
 3 captive insurance companies such as Bayshore and Champion Select that permitted the
 4 Carpofts to hide assets outside of the United States. [expand]

5 305. For example, the Carpofts created a Cook Islands trust in 2016, utilizing
 6 Wentz, the Strauss Firm, Muraco, and Praeditis.

7 306. As part of this scheme, the Carpofts were to execute a statement of solvency,
 8 which was at that time, completely untrue.

9 307. The Carpofts also instructed Wentz to create Panda, a company located in
 10 Hong Kong, to purportedly purchase batteries for the MSGs, which allowed for funds to be
 11 effectively parked outside of the United States.

12 308. Upon information and belief, the over \$20,000,000 that had been placed in
 13 the Panda account was removed by the Asset Hiders.

14 309. With assistance from Lauer, the Strauss Firm, Strauss and Hacker, among
 15 others, the Carpofts also created DC Solar International a Nevis Island International
 16 Corporation in Nevis, a notorious off-shore tax shelter, to be party to certain sale-leaseback
 17 deals rather than DC Solar Solutions, in order to keep income out of the United States.

18 310. During the time that the Carpofts were setting up offshore, in August 2018,
 19 Jeffrey Carpoft pushed to collect more funds and involved Moore in a collection matter
 20 where the debtor feared for his family's safety.

21 **V. ALLEGATIONS RELATED TO RICO VIOLATIONS**

22 311. Plaintiff is a "person" within the meaning of 18 U.S.C. § 1964(c).

23 312. At all times relevant hereto, Plaintiff and the Defendants were and are
 24 "persons" within the meaning of 18 U.S.C. §1961(3).

25 **A. Enterprise**

26 313. An enterprise need not be a specific legal entity but rather may be "any union
 27 or group of individuals associated in fact although not a legal entity."

28 314. In this case, the enterprise ("RICO") for RICO purposes consists of DC Solar

1 Companies.

2 315. These Defendants individually and through their agents represented to their
 3 victims that these purchases qualified for an “Energy Credit” under Internal Revenue Code
 4 § 48, as well as depreciation.

5 316. However, on information and belief, these purchases’ qualifications for the
 6 Tax Credit under the Code is unclear, as most of the MSGs purportedly sold to Purchasers
 7 were never manufactured or delivered to the RICO Enterprise.

8 317. The Schemes were devised solely to generate significant funds thereafter
 9 consumed by the Core Defendants for personal purposes or to pay off earlier Purchasers,
 10 rather than to manufacture or pay for delivery of the promised new MSGs.

11 318. Because the terms of the Fund Contracts tied the fortunes of the Purchasers
 12 to those of DC Solar and its ability to manufacture and then sub-lease them at optimal or
 13 above true-market value rates, Purchasers were investing in a common enterprise.

14 319. Because the terms of the Fund Contracts made Purchasers entirely dependent
 15 on DC Solar to manufacture, operate and maintain their purported MSGs, DC Solar and the
 16 Core Defendants’ efforts were essential to the failure or success of the common enterprise.

17 320. Purchasers also had an expectation of profits from the tax benefits and
 18 payment stream to be generated from the enterprise.

19 321. The Core Defendants engaged in a common plan, transaction and course of
 20 conduct described herein in connection with the solicitation of purchases of MSGs, pursuant
 21 to which they knowingly or recklessly engaged in acts, transactions, practices and a course
 22 of business that operated as a fraud upon the Plaintiff, the primary purpose and effect of
 23 which was to generate significant income by fraudulently selling and subleasing MSGs.

24 322. The Core Defendants sought out large, prominent Purchasing Members with
 25 high visibility and high taxable income in order to carry out the Schemes.

26 323. While the Core Defendants participated in the RICO Enterprise and were a
 27 part of it, the Core Defendants also had an existence separate and distinct from the
 28 Enterprise.

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324. The Core Defendants maintained an interest in and control of the RICO Enterprise and also conducted or participated in the conduct of the affairs of the Enterprise through a pattern of racketeering activity.

325. The Core Defendants' control and participation in the RICO Enterprise were necessary for the successful operation of the Core Defendants' Schemes.

326. The RICO Enterprise had an ascertainable structure separate and apart from the pattern of racketeering activity in which the Core Defendants engaged.

B. Operation of the RICO Enterprise

327. The Core Defendants perpetrated the Schemes described in detail above.

328. Each of the Core Defendants were vital to the implementation of the Schemes, played an important role in the RICO Enterprise, and either controlled the Enterprise or knowingly implemented the decisions of others in the Enterprise.

329. The Core Defendants intended to commit wire and/or mail fraud in connection with the promotion and operation of the Schemes based on the significant evidence uncovered in this case.

330. The Core Defendants' racketeering activity in creating, designing, establishing, promoting, and vouching for the Schemes involved numerous false and misleading misrepresentations and omissions that amount to a scheme or artifice to defraud.

331. Plaintiff relied on the Core Defendants' representations in perpetrating the Schemes, and have been damaged by the Core Defendants' actions.

C. Predicate Acts

332. With respect to the activities alleged herein, the Core Defendants acted at all times with malice toward the Plaintiff, intending to engage in the conduct complained of for the benefit of Defendants and with knowledge that such conduct was unlawful.

333. The conduct of the Core Defendants was done with actionable wantonness and reckless disregard for the rights of Plaintiff, as well as the laws to which the Core Defendants are subject, the same amounting to actionable wantonness.

334. With respect to the activities alleged herein, each Core Defendant agreed to

the operation of the transaction or artifice to deprive Plaintiff of property interests.

335. In furtherance of these agreements, each Core Defendant also agreed to interfere with, obstruct, delay or affect interstate commerce by attempting to obtain and/or actually obtaining property interests to which the Core Defendants were not entitled.

336. With respect to the overt acts and activities alleged herein, each Core Defendant conspired with each other to violate 18 U.S.C. §1962(c), in violation of 18 U.S.C. §1962(d).

337. Each Core Defendant also agreed and conspired with each other Core Defendant to participate, directly or indirectly, in interfering with, obstructing, delaying or affecting commerce by attempting to obtain and/or actually obtaining property interests to which the Core Defendants were not entitled.

338. The numerous predicate acts of wire and/or mail fraud in addition to other fraudulent acts, are part of separate fraudulent transactions by the Core Defendants designed to defraud the Plaintiff of money and property interests under false pretenses.

339. As a victim of these unlawful patterns of illegal activity, Plaintiff has and continues to suffer losses as a result of these activities. The acts which caused injuries to the Plaintiff were performed for financial gain.

340. In carrying out the overt acts and fraudulent transactions described above, the Core Defendants engaged in, *inter alia*, conduct in violation of federal laws, including 18 U.S.C. §§1343-1346, and 18 U.S.C. §1961 *et seq.*

341. Section 1961(1) of RICO provides that “racketeering activity” means any act indictable under any of the following provisions of Title 18, United States Code: §1343 (relating to wire fraud) and §1346 (relating to scheme or artifice to defraud).

D. Violations of 18 U.S.C. § 1343

342. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth herein.

343. For the purpose of executing and/or attempting to execute their transaction to defraud and to obtain money by means of false pretenses, representations or promises, the

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1 Core Defendants, in violation of 18 U.S.C. § 1343, transmitted and received by wire and/or
2 mail matter and things therefrom including but not limited to contracts, instructions,
3 correspondence, funds, and other interstate transmittals and transfers.

4 344. The Core Defendants' violations of 18 U.S.C. § 1343 are subject to continuing
5 investigation and revaluation.

6 345. However, the acts described *supra*, provide, by way of illustration but not
7 limitation, representative examples of the Core Defendants' 18 U.S.C. § 1343 violations.

8 346. Each of the documents, invoices, letters, emails, applications, and/or tax
9 forms that the Core Defendants sent by wire and/or mail to Plaintiff served at least two roles
10 in the RICO Enterprise.

11 347. First, these documents, standing alone, were fraudulent. The Core Defendants
12 knew that the vast majority of MSGs allegedly being sold were not in existence or being
13 subleased.

14 348. Second, in addition to being fraudulent standing alone, these documents were
15 used to advance the fraudulent Schemes that the Core Defendants perpetrated on Plaintiff.

16 349. In those matters and things sent or delivered by wire, through other interstate
17 electronic media, and/or by mail the Core Defendants and their co-conspirators falsely and
18 fraudulently misrepresented and fraudulently suppressed material facts from Plaintiff as
19 described above, in violation of 18 U.S.C. § 1343.

20 350. The Core Defendants' fraudulent statements and omissions include
21 insufficient demand in the market for the MSGs, i.e., that the MSGs would all be leased and
22 would retain sufficient value after five years to repay the Promissory Notes to DC Solar
23 Solutions and return additional revenue to the relevant Fund.

24 351. The Core Defendants' fraudulent statements and omissions include that DC
25 Solar had subleased thousands of MSGs to legitimate third-party lessees for amounts that
26 would support each MSG's \$150,000 valuation.

27 352. The Core Defendants' fraudulent statements and omissions includes that DC
28 Solar Solutions, or one of the other Core Defendants, had separate agreements with the

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1 major sublessees which negated or paid the lease payments that DC Solar Distribution
2 owed.

3 353. The Core Defendants' fraudulent statements and omissions include that all
4 MSGs sold had been built and were "placed in service" as of the closing date of each
5 Purchase Agreement, or any subsequent dated provided therein.

6 354. The Core Defendants' fraudulent statements and omissions include that
7 Bayliss was an independent engineer who had viewed and tested all of the MSGs sold.

8 355. On information and belief, the predicate acts, including the predicate acts of
9 wire fraud, are continuing.

10 356. The Core Defendants, on their own and as part of a common fraudulent
11 scheme and conspiracy, defrauded Plaintiff as set out above.

12 357. The Core Defendants intentionally and knowingly made these material
13 misrepresentations and intentionally and knowingly suppressed material facts from
14 Plaintiff, for the purpose of deceiving it and thereby obtaining financial gain.

15 358. The Core Defendants either knew or recklessly disregarded that the
16 misrepresentations and omissions described above were material. Plaintiff was injured as a
17 result of the misrepresentations.

18 359. The Core Defendants made continual use of wire transmissions, in addition
19 to communications made outside the interstate wire systems, to effectuate their fraudulent
20 Schemes. In addition to using in person, telephonic, and other means of communication to
21 make fraudulent statements, the Core Defendants transmitted numerous specific fraudulent
22 statements to Plaintiff through the mail, by fax, and/or by email.

23 360. The Core Defendants intentionally and knowingly made these material
24 misrepresentations and intentionally and knowingly suppressed material facts from
25 Plaintiff, for the purpose of deceiving it and thereby obtaining financial gain.

26 361. The Core Defendants either knew or recklessly disregarded that the
27 misrepresentations and omissions described above were material. Plaintiff was injured as a
28 result of the misrepresentations.

1 362. As set forth above, there are numerous specific examples of the predicate acts
2 of fraud, including wire fraud, committed by the Core Defendants pursuant to their
3 transactions to defraud Plaintiff.

4 363. Plaintiff has therefore been injured in its business or property as a result of
5 the Core Defendants' overt acts and racketeering activities.

E. Pattern of Racketeering Activity

7 364. Plaintiff repeats, realleges and incorporates each and every prior factual
8 allegation in the preceding paragraphs as if fully set forth herein.

9 365. As set forth above, the Core Defendants have engaged in a “pattern of
10 racketeering activity,” as defined in §1961(5) of RICO by committing and/or conspiring to
11 commit at least two such acts of racketeering activity, as described above, within the past
12 ten years.

13 366. Each such act of racketeering activity was related, had similar purposes,
14 involved the same or similar participants and methods of commission, and had similar
15 results impacting upon similar victims, including Plaintiff.

16 367. The multiple acts of racketeering activity committed and/or conspired to by
17 Defendants, as described above, were related to each other and amount to and pose a threat
18 of continued racketeering activity, and, therefore, constitute a “pattern of racketeering
19 activity,” as defined in 18 U.S.C. §1961(5). Plaintiff alleges that the course of conduct
20 engaged in by the Core Defendants constituted both “continuity” and “relatedness” of the
21 racketeering activity, thereby constituting a pattern of racketeering activity, as that term is
22 defined in 18 U.S.C. §1961(5).

23 368. Plaintiff can show the relatedness prong because the predicate acts have
24 “similar purposes, results, participants, or methods of commission or are related to the
25 affairs of the Enterprise.” All predicate acts had the same purpose of utilizing the Enterprise
26 to misrepresent the nature of the transactions underlying the schemes so that the Core
27 Defendants could defraud Plaintiff. Plaintiff alleges that the continuity of the pattern of
28 racketeering activity is “closed-ended” inasmuch as a series of related predicate offenses

extended since at least 2011 (a substantial period of time).

369. Moreover, the continuity of the pattern of racketeering can also be established under “open-ended continuity” as the predicate offenses are part of the Enterprise’s regular way of doing business, and the predicates are attributed to the Core Defendants’ operations as part of a long-term association that existed for criminal purposes. Further, the last act of racketeering activity that is alleged as the basis of Plaintiff’s claims occurred within four years of a prior act of racketeering.

370. Three key individuals that assisted with the operations of the RICO Enterprise have plead guilty to federal felonies.

371. Plaintiff therefore has been injured in its business or property as a result of the Core Defendants' overt acts and racketeering activities as described above and throughout this Complaint.

VI. DAMAGES

372. Plaintiff was damaged by all Defendants in various ways.

373. First, Plaintiff suffered costs for the presumptive value of the MSGs purchased by Funds but never delivered.

374. Second, Plaintiff incurred significant costs related to closing the deals to purchase the MSGs, as well as to locate and store MSGs after the Schemes were uncovered.

375. Third, Plaintiff was deprived of the benefit of its bargain, specifically the value of promised Tax Credit, depreciation, rental, and management income.

376. Fourth, Plaintiff paid for services not rendered, and those amounts should be disgorged.

VII. CLAIMS FOR RELIEF

Count I

(Federal RICO - 18 U.S.C. §1962(c) – Core Defendants)

377. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth herein.

^{378.} Section 1962(c) of RICO provides that it “shall be unlawful for any person

1 employed by or associated with any enterprise engaged in, or the activities of which affect,
2 interstate or foreign commerce, to conduct or participate, directly or indirectly, in the
3 conduct of such enterprise's affairs through a pattern of racketeering activity or collection
4 of unlawful debt.”

5 379. Plaintiff incorporates, as though fully set out herein, its allegations regarding
6 Enterprise.

7 380. Plaintiff incorporates, as if fully set forth herein, its allegations that the Core
8 Defendants have engaged in a pattern of racketeering activity.

9 381. The Core Defendants, who are associated with and are part of the Enterprise,
10 conduct and have conducted the Enterprise's affairs through a pattern of racketeering
11 activity, as set forth in this Complaint.

12 382. Through the fraudulent and wrongful conduct described in this Complaint,
13 the Core Defendants seek and have sought to deprive Plaintiff of money and property rights.

14 383. To successfully execute their Schemes in the manner set forth in this
15 Complaint, the Core Defendants must have a system that allows Core Defendants to access
16 their victims in a manner to effectuate the fraudulent transactions. The Enterprise allows
17 the Defendants this access.

18 384. With respect to the activities alleged herein, the Core Defendants have acted
19 at all times with malice toward Plaintiff in their efforts to acquire and maintain an interest
20 in an Enterprise that affects interstate commerce.

21 385. In carrying out the overt acts and fraudulent scheme described above, the Core
22 Defendants have engaged in conduct in violation of federal laws, including *inter alia* 18
23 U.S.C. §§ 1343 and 1346, and 18 U.S.C. §1961, *et seq.* as set forth more fully above.

24 386. Therefore, the Core Defendants have each engaged in “racketeering activity”
25 which is defined in §1961(1) of RICO to mean “any act which is indictable under any of
26 the following provisions of 18 U.S.C. §1343 (relating to wire fraud)”

27 387. As a proximate result of the Core Defendants' unlawful pattern of illegal
28 fraudulent conduct as described above, Plaintiff has been injured in its business or property

1 as described above.

2 **Count II**

3 **(Federal RICO - 18 U.S.C. §1962(d) – Core Defendants)**

4 388. Plaintiff repeats, realleges and incorporates each and every prior factual
5 allegation in the preceding paragraphs as if fully set forth herein.

6 389. This claim for relief arises under 18 U.S.C. §1964(a) of RICO and seeks relief
7 from the Core Defendants' activities described herein for violations of 18 U.S.C. §1962(d)
8 for their conspiracy to violate 18 U.S.C. §1962(c).

9 390. Plaintiff incorporates, as if fully set forth herein, its allegations regarding the
10 Enterprise. Plaintiff incorporates, as if fully set forth herein, its allegations that the Core
11 Defendants have engaged in a pattern of racketeering activity. Absent the Core Defendants'
12 conspiracy and joint efforts, the Core Defendants' Schemes would not be successful. Acting
13 jointly, the Core Defendants have and have possessed greater power, have been able to exert
14 greater influence, have been able to successfully engage in the activities set forth herein,
15 and have had greater ability to conceal their activities.

16 391. The Core Defendants have also violated §1962(d) by conspiring to violate 18
17 U.S.C. §1962(c). The object of this conspiracy has been and is to conduct or participate in,
18 directly or indirectly, the conduct of the affairs of the §1962(c) Enterprise(s) described
19 previously through a pattern of racketeering activity.

20 392. As demonstrated in detail above, the Core Defendants have engaged in
21 numerous overt and predicate fraudulent racketeering acts in furtherance of the conspiracy
22 including systemic fraudulent practices designed to defraud the Plaintiff of money and other
23 property interests.

24 393. The nature of the above described acts, material misrepresentations, and
25 omissions in furtherance of the conspiracy give rise to an inference that Core Defendants
26 not only agreed to the objective of a violation of 18 U.S.C. §1962(d) by conspiring to violate
27 18 U.S.C. §1962(c), but also they were aware that their ongoing fraudulent acts have been
28 and are part of an overall pattern of racketeering activity. The Core Defendants have

engaged in the commission of and continue to commit overt acts and the following described unlawful racketeering predicate acts that have and continue to generate income or proceeds received by the Core Defendants from such pattern of racketeering activity, including:

- 394. Multiple instances of wire fraud violations of 18 U.S.C. § 1343; and
- 395. Multiple instances of travel in interstate commerce to attempt to and to actually commit mail fraud and wire fraud.
- 396. As a proximate result of the Core Defendants' conduct as described above, Plaintiff has been injured in its business or property as described above.

Count III

(Fraud: Intentional Misrepresentation – Core Defendants)

- 397. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.
- 398. In perpetrating the Schemes, the Core Defendants represented to the Plaintiff that the Funds would receive certain tax and other monetary benefits, and obtain title to MSGs, from the Funds' purchase of MSGs from DC Solar Solutions.
- 399. The Core Defendants' representation was false.
- 400. The Core Defendants knew that the representation was false when they made it.
- 401. The Core Defendants intended that the Plaintiff rely on the representation.
- 402. Plaintiff reasonably relied on the Core Defendants' representation.
- 403. Plaintiff became a member in the Funds and undertook obligations as a managing member based upon the representations of the Core Defendants.
- 404. Plaintiff was harmed.
- 405. Plaintiff's reliance on the Core Defendants' representation was a substantial factor in causing Plaintiff's harm.

Count IV**(Fraud: Intentional Concealment – Core Defendants)**

406. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as fully set forth here.

407. In perpetrating the Schemes, the Core Defendants intentionally failed to disclose certain facts to Plaintiff, i.e., that the MSGs were not being manufactured or subleased, and that the alleged lease revenues paid to the Funds by DC Solar Distribution were in reality circulated Purchaser monies paid to DC Solar Solutions for new MSGs.

408. The Core Defendants intentionally failed to disclose these and other material facts to Plaintiff, which were known only to the Core Defendants, and prevented Plaintiff from discovering these facts.

409. Plaintiff did not know the concealed facts.

410. The Core Defendants intend to deceive Plaintiff by concealing the facts.

411. Plaintiff became a member in the Funds and undertook obligations as a managing member based upon the concealment of the Core Defendants.

412. If the omitted information had been disclosed to Plaintiff, Plaintiff would have reasonably acted differently.

413. Plaintiff was harmed.

414. The Core Defendants' concealment was a substantial factor in causing Plaintiff's harm.

Count V**(Fraud in the Inducement- Core Defendants)**

415. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.

416. In perpetrating the Schemes, the Core Defendants represented to the Plaintiff that the Funds would receive certain tax and other monetary benefits, and obtain title to MSGs, from the Funds' purchase of MSGs from DC Solar Solutions.

417. Further, the Core Defendants represented to the Plaintiff that there were sufficient

1 lease revenues and third-party leases to lease the MSGs being sold to the Funds.

2 418. Further, the Core Defendants represented to the Plaintiff that the MSGs for each
3 Fund were built and would exist at the end of the five to seven years, when Plaintiff would become
4 the 95% owner of each Fund.

5 419. The Core Defendants' representation was false.

6 420. The Core Defendants knew that the representation was false when they made it.

7 421. The Core Defendants intended that the Plaintiff rely on the representation.

8 422. Plaintiff reasonably relied on the Core Defendants' representation.

9 423. Plaintiff became a member in the Funds and undertook obligations as a managing
10 member based upon the representations of the Core Defendants.

11 424. Plaintiff was harmed.

12 425. Plaintiff's reliance on the Core Defendants' representation was a substantial factor
13 in causing Plaintiff's harm

Count VI

(Conversion- Core Defendants)

16 426. Plaintiff repeats, realleges and incorporates each and every prior factual
17 allegation in the preceding paragraphs as if fully set forth here.

18 427. As a member of the Funds, Plaintiff holds an ownership interest in the MSGs
19 and/or the money paid to DC Solar Solutions for the purchase of the purportedly-existing
20 MSGs.

21 428. The Core Defendants substantially interfered with Plaintiff's property.

22 429. Plaintiff did not consent.

23 430. Plaintiff was harmed.

24 431. The Core Defendants' conduct was a substantial factor in causing Plaintiff's
25 harm.

Count VII

(Civil Conspiracy – Core Defendants and Scheme Aiders/Abettors)

28 432. Plaintiff repeats, realleges and incorporates each and every prior factual allegation

in the preceding paragraphs.

433. The Core Defendants acted in combination.

434. The Core Defendants intended to accomplish an unlawful objective together.

435. The Core Defendants, through their acts or omissions, sought to fraudulently induce
ff to take actions and undertake obligations relating to the Funds, to make fraudulent
resentations to Plaintiff, or to fraudulently conceal information from Plaintiff relating to the
the MSGs, and DC Solar.

436. The Core Defendants agreed to a concert of actions to accomplish the objective.

437. The Core Defendants each committed the acts set forth in the preceding paragraphs to accomplish the objective.

438. The Core Defendants intended to accomplish an unlawful objective for the purpose
of harming Plaintiff and others.

439. The Core Defendants committed unlawful acts in furtherance of the agreement.

440. Plaintiff suffered damages as a result of the act or acts.

Count VIII

(Unjust Enrichment – Core Defendants and Halo)

441. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as fully set forth here.

442. The Core Defendants were enriched as a result of the Plaintiff's management services, services in locating and moving MSGs, and/or monetary participation in the Core Defendants' businesses.

443. Halo was enriched by Plaintiff advancing funds and incurring costs by which
Halo benefitted, but refused or failed to reimburse for or pay to Plaintiff.

444. The Plaintiff was impoverished as a result of these services and/or participation without promised compensation from the Core Defendants.

445. If no adequate remedy at law is available for Plaintiff's impoverishment, the Plaintiff is entitled to recover under a theory of unjust enrichment.

Count IX**(Intentional Interference with Contractual Relationship or Business Expectancy – Core Defendants)**

446. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.

447. There was a contract or contracts between Plaintiff and third parties, or a business expectancy between Plaintiff and third parties.

448. The Core Defendants knew of the contract or business expectancy.

449. The Core Defendants' conduct prevented performance under the contracts or business expectancy, or made performance more expensive or difficult.

450. The Core Defendants intended to disrupt the performance of this contract or business expectancy, and/or knew that disruption of performance was certain or substantially certain to occur.

451. Plaintiff was harmed.

452. The Core Defendants' conduct was a substantial factor in causing Plaintiff's harm.

Count X**(Negligence – Alvarez & Marsal)**

453. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.

454. Alvarez & Marsal owed a duty to the Plaintiff in preparing the Appraisals.

455. Alvarez & Marsal breached its duty and was negligent in preparing the Appraisals.

456. Plaintiff was harmed.

457. Alvarez & Marsal's conduct caused Plaintiff's harm.

Count XI**(Negligent Misrepresentation – Alvarez & Marsal)**

458. Plaintiff repeats, realleges and incorporates each and every prior factual

allegation in the preceding paragraphs as if fully set forth here.

459. Alvarez & Marsal represented to the Plaintiff that the Appraisals were true and accurate representations of the value of the MSGs.

460. Alvarez & Marsal's representation was not true.

461. Alvarez & Marsal had no reasonable grounds for believing the representation was true when it made it.

^{462.} Alvarez & Marsal intended that Plaintiff rely on this representation.

463. Plaintiff reasonably relied on Alvarez & Marsal's representation.

464. Plaintiff was harmed.

465. Plaintiff's reliance on Alvarez & Marsal's representation was a substantial factor in causing Plaintiff's harm.

Count XII

(Professional Negligence – Roach)

466. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.

467. Plaintiff retained Roach to provide accounting services and counsel to Plaintiff with respect to the Funds, MSG purchases and related deals.

468. As accountant for Plaintiff, Roach had a duty to exercise reasonable care, skill, and diligence in performing services and providing advice to Plaintiff.

469. Plaintiff reasonably relied on the skill and expertise of Roach to provide advice and counsel consistent with the standards other members of the accounting profession commonly possess and exercise.

470. Roach breached the duty of care owed to Plaintiff by failing to use the skill and care that a reasonably careful accountant would have used in providing services and advice in similar circumstances.

471. Plaintiff was harmed by this breach.

Count XIII**(Breach of Fiduciary Duty – Roach)**

472. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.

473. Roach was Plaintiff's accountant, and acted on behalf of Plaintiff with respect to the Funds, MSG purchases and related deals.

474. Roach failed to act as a reasonably careful accountant would have acted under the same or similar circumstances.

475. Plaintiff was harmed by this failure.

476. Roach's conduct was a substantial factor in causing Plaintiff's harm.

Count XIV**(Professional Negligence – Wentz, Yee, Montage, & Radius/Vistra)**

477. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.

478. Plaintiff retained Wentz, Yee, Montage and Radius/Vistra employees to provide accounting services and counsel to Plaintiff with respect to the Funds, MSG purchases and related deals.

479. As accountants for Plaintiff, Wentz, Yee, Montage and Radius/Vistra employees had a duty to exercise reasonable care, skill, and diligence in performing services and providing advice to Plaintiff.

480. Plaintiff reasonably relied on the skill and expertise of Wentz, Yee, Montage and Radius/Vistra employees to provide advice and counsel consistent with the standards other members of the accounting profession commonly possess and exercise.

481. Wentz, Yee, Montage and Radius/Vistra employees breached the duty of care owed to Plaintiff by failing to use the skill and care that a reasonably careful accountant would have used in providing services and advice in similar circumstances.

482. Plaintiff was harmed by this breach.

Count XV

(Breach of Fiduciary Duty- Wentz, Yee, Montage & Radius/Vistra)

483. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.

484. Wentz, Yee, Montage, and Radius/Vistra employees were Plaintiff's accountants, and acted on behalf of Plaintiff with respect to the Funds, MSG purchases and related deals.

485. Wentz, Yee, Montage, and Radius/Vistra employees failed to act as reasonably careful accountants would have acted under the same or similar circumstances.

486. Plaintiff was harmed by these failures.

487. Wentz, Yee, Montage, and Radius/Vistra employees conduct was a substantial factor in causing Plaintiff's harm.

Count XVI

(Negligent Misrepresentation – All Defendants)

488. Plaintiff repeats, realleges and incorporates each and every prior factual allegation in the preceding paragraphs as if fully set forth here.

489. All Defendants represented to Plaintiff that certain information was true.

490. All Defendants representations were not true.

491. All Defendants had no reasonable grounds for believing the representations were true when they made it or within the time periods of their involvement.

492. All Defendants intended that Plaintiff rely on these representations.

493. Plaintiff reasonably relied on All Defendants' representations.

494. Plaintiff was harmed.

495. Plaintiff's reliance on all Defendants' representations was a substantial factor in causing its harm.

496. All Defendants failed to disclose information that was known, or should have been known, to be important to the Plaintiff and Purchasers in their transactions.

497. Reservation of Rights. Solarmore hereby reserves and does not waive:

- 1 a. Any and all rights, claims, or remedies against other individuals and/or
 2 entities currently the subject of tolling agreements with Plaintiff;
 3 b. To the extent applicable, any and all claims or remedies that are asserted
 4 through Plaintiff's instant suit, and which might benefit any other Purchasers,
 5 Fund LLCs, and/or other Court-appointed representatives for said Purchasers,
 6 and/ or Fund LLC's; and/or
 7 c. the right to name additional individuals and/or entities and seek additional
 8 claims and/or further remedies based upon ongoing investigations.

9 **VIII. PRAYER FOR RELIEF**

10 Wherefore, Plaintiff prays for judgment against Defendants as follows:

- 11 A. For damages against all Defendants in an amount in excess of \$75,000 to be
 12 proven at trial.
 13 B. For treble damages under RICO.
 14 C. For an award of Plaintiff's reasonable attorneys' fees in an amount to be
 15 proven at trial.
 16 D. For such other relief as the Court may determine.

17 **IX. DEMAND FOR JURY TRIAL**

18 Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands a jury trial on all
 19 issues in this litigation that are triable to a jury.

20 DATED: December 17, 2019

 SNELL & WILMER L.L.P.

21 By: /s/ Nathan G. Kanute

22 Nathan G. Kanute
 23 50 W. Liberty Street, Suite 510
 24 Reno, NV 89501

25 Don Bivens (*pro hac vice pending*)
 26 Donald L. Gaffney (*pro hac vice*
 27 *pending*)
 28 One Arizona Center, Suite 1900
 400 East Van Buren Street
 Phoenix, AZ 85004-2202
 Attorneys for Plaintiff

EXHIBIT E

1

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5

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

6
7 In Re:

2:13-CV-1113 JCM (PAL)

8
9 AMERICAN PACIFIC FINANCIAL
10 CORPORATION,

11 Debtor.

12
13 DOTAN Y. MELECH, not individual
14 but as Chapter 7 trustee of the above
debtor,

15 Plaintiff(s),

16 v.

17 LARRY POLHILL, et al.,

18 Defendant(s).

19

20
ORDER

21 Presently before the court is movant Larry Polhill's motion to withdraw reference. (Doc. #
22 1-1). The appointed trustee, Dotan Melech, has filed an opposition (doc. # 1-1, p. 109-120) and
23 Polhill has filed a reply (doc. # 3).

24 This motion arises out of an adversary action in the underlying bankruptcy proceedings. The
25 complaint contains eleven causes of action for: (1) breach of fiduciary duty; (2) aiding and abetting
26 breach of fiduciary duty/civil conspiracy; (3) conversion; (4) avoidance of preferential transfers; (5)
27 avoidance of fraudulent transfers; (6) turnover; (7) unjust enrichment; (8) constructive trust; (9)

28

1 equitable lien; (10) breach of contract; and (11) breach of covenant of good faith and fair dealing.

2 Polhill asserts that the matter is subject to withdrawal of reference pursuant to 28 U.S.C. §
 3 157(d). That section provides:

4 The district court may withdraw, in whole or in part, any case or
 5 proceeding referred under this section, on its own motion or on timely
 6 motion of any party, for cause shown. The district court shall, on
 7 timely motion of a party, so withdraw a proceeding if the court
 determines that resolution of the proceeding requires consideration of
 both title 11 and other laws of the United States regulating
 organizations or activities affecting interstate commerce.

8 Polhill has not filed a proof of claim and has asserted a jury demand. Polhill asserts that the
 9 causes of action in the underlying complaint are not listed in 28 U.S.C. §157(b)(2) as core
 10 proceedings. In particular, he maintains that “ each [cause of action] involves state law issues and
 11 thus is beyond the reach of the bankruptcy court to hear and determine. Such claims should be
 12 adjudicated by an Article III court independent of whether a proof of claim has been filed.” (Doc.
 13 # 1-1, p. 67) (citing *In re Castlerock Properties*, 781 F.2d 159, 162 (9th Cir. 1986)).

14 Polhill further asserts that, “[b]ecause this Court will be required to review the bankruptcy
 15 court's proposed findings and conclusions of law de novo, judicial efficiency is promoted by
 16 withdrawing the reference and holding one hearing instead of two to resolve factual issues.” (*Id.*).
 17 Melech opposes the motion on the grounds that it is “premature” despite conceding the inevitability
 18 of the matter being brought to this court.

19 With respect to “non-core” claims, the default practice is for the bankruptcy court to hold
 20 proceedings and make proposed findings of fact and conclusions of law, which in turn are reviewed
 21 by the District Court. *See LR 1001(a); 28 U.S.C. § 157.* The Ninth Circuit has held that in
 22 considering withdrawal, a "district court should consider the efficient use of judicial resources, delay
 23 and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping,
 24 and other related factors." *Sec. Farms v. Int'l Brotherhood of Chauffeurs, Warehousemen & Helpers*,
 25 124 F.3d 999,1008 (9th Cir. 1997).

26 The court finds judicial efficiency and the uniformity of bankruptcy administration would
 27 be better served by having the bankruptcy court continue to decide the pre-trial motions, including
 28

1 discovery related ones, prior to removing the case to this court.

The bankruptcy court is well-versed in the history and procedural posture of this action. It has managed these proceedings over the last several years, and there is no legitimate reason to withdraw at this juncture. As the court most familiar with this case, the bankruptcy court is in the position to most efficiently manage its course while minimizing delay and costs. *Sec. Farms*, 124 F.3d 999. In sum, Polhill has not met his burden of demonstrating why this case warrants immediate withdrawal.

8 || Accordingly,

9 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the motion to withdraw
10 reference (doc. # 1) be, and the same hereby is, DENIED.

11 DATED February 5, 2014.

Xenos C. Mahan
UNITED STATES DISTRICT JUDGE

EXHIBIT F

1
2
3
UNITED STATES DISTRICT COURT
4
DISTRICT OF NEVADA
5

6
7 In re USA COMMERCIAL MORTGAGE)
CO.,)
8 Debtor.)
9 _____) Case No. 2:14-cv-00455-RCJ-PAL
10 USACM LIQUIDATING TRUST,) Adv. No. 08-ap-01066-LBR
11 Plaintiff,) Bankr. No. 06-bk-10725-LBR
12 vs.)
13 COMPASS USA SPE, LLC et al.,)
14 Defendants.)
15

ORDER

16 The Bankruptcy Court has recommended withdrawal of the reference in this post-
17 judgment adversary proceeding. No party has timely objected. For the reasons given herein, the
18 Court withdraws and stays the proceeding.

19 **I. FACTS AND PROCEDURAL HISTORY**

20 In February 2008, USACM Liquidating Trust (“USACMLT”) brought a core adversary
21 proceeding in this district based on the consolidated USA Commercial Mortgage Co.
22 (“USACM”) bankruptcy case against, *inter alia*, Republic Title of Texas, Inc. (“RTT”), seeking
23 an order that RTT turn over to USACMLT a total of \$2,153,000 to which it was allegedly
24 entitled under two escrow agreements as successor to the rights of Debtor USACM. (See Adv.

1 Compl., ECF No. 1 in Adv. No. 08-ap-1066). USACMLT also asked the Bankruptcy Court for
 2 certain relief against Compass USA SPE, LLC and Compass Partners, LLC (collectively,
 3 “Compass”). (*See id.*).

4 In September 2009, the Bankruptcy Court permitted Debt Acquisition Co. of America V,
 5 LLC (“DACA V”) to intervene, file a complaint in intervention, and substitute itself as Plaintiff
 6 in place of USACMLT. (*See Order*, ECF No. 67 in Adv. No. 08-ap-1066). The court noted that
 7 once DACA V filed a complaint in intervention, that pleading would be the “sole extant
 8 complaint” in the adversary proceeding. (*See id.*). DACA V filed the Complaint in Intervention
 9 (“CI”) later that month; the Court will refer to the CI as the Amended Complaint (“AC”),
 10 because DACA V has been substituted as the Plaintiff, not merely permitted to intervene,
 11 because the pleading is entered as an “Amended Complaint” in the electronic docket, and
 12 because the AC is the sole operative complaint. (*See Am. Compl.*, ECF No. 69 in Adv. No. 08-
 13 ap-1066). In the AC, DACA V sought a money judgment against Compass in the amount of
 14 \$476,677.92 plus interest, turnover of a \$237,023.29 check held by USACM LT otherwise
 15 payable to Compass, and a declaratory judgment that any attorney’s lien of Milbank, Tweed,
 16 Hadley & McCloy, LLP (“Milbank”) against the check was inferior to DACA V’s rights to the
 17 check. (*See id.*). When Compass defaulted and Milbank stipulated to split the check with DACA
 18 V, the Bankruptcy Court entered judgment, accordingly. (*See J.*, ECF No. 124 in Adv. No. 08-
 19 ap-1066).

20 In August 2013, the Clerk of the Bankruptcy Court issued a writ of execution (the
 21 “Writ”) to the U.S. Marshal to execute on DACA V’s judgment in the amount of \$422,120.54.
 22 (*See Writ Exec.*, ECF No. 128 in Adv. No. 08-ap-1066). In January 2014, Platinum Financial
 23 Trust, LLC (“PFT”), to whom DACA V has assigned its judgment in May 2013, applied to the
 24

1 Bankruptcy Court for a judgment against Donna Cangelosi and Margarita Annex SPE for failing
 2 to comply with writs of garnishment. (*See* Appl., ECF No. 133 in Adv. No. 08-ap-1066). PFT
 3 asked the Bankruptcy Court to reopen the adversary proceeding for post-judgment proceedings
 4 under Bankruptcy Rules 7069 and 7070. (*See* Mot., ECF No. 134 in Adv. No. 08-ap-1066). The
 5 Bankruptcy Court granted the motion. (*See* Order, ECF No. 135 in Adv. No. 08-ap-1066). The
 6 Bankruptcy Court then issued an order *sua sponte* recommending withdrawal of the reference,
 7 which is now pending before the Court.

8 **II. LEGAL STANDARDS**

9 The Supreme Court has ruled that a bankruptcy court—the judges of which are not
 10 afforded the protections of life tenure and irreducible salary given to judges under Article III of
 11 the Constitution—cannot enter final judgments on matters traditionally decided by Article III
 12 judges, such as contract disputes. *See Dunmore v. United States*, 358 F.3d 1107, 1114 (9th Cir.
 13 2004) (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).
 14 Congress amended the Bankruptcy Code to conform to this ruling, distinguishing “core”
 15 bankruptcy proceedings from “non-core” proceedings. *Id.* Congress has enumerated what it
 16 considers to be core proceedings, *see id.* (citing 11 U.S.C. § 157(b)(2)), but it has not enumerated
 17 non-core proceedings, *see id.* “Non-core” proceedings are those that “do not depend on the
 18 Bankruptcy Code for their existence and ... could proceed in another court.” *Id.* (citing *Sec.
 19 Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997)).

20 A bankruptcy court may hear and finally determine bankruptcy cases under Title 11 and
 21 proceedings arising under Title 11 or arising in a case under Title 11. *See* 11 U.S.C. § 157(b)(1).
 22 A bankruptcy court may hear a non-core proceeding but must submit proposed findings of fact
 23 and conclusions of law to the district court for final determination de novo. *Id.* § 157(c)(1). The
 24

1 Ninth Circuit has adopted the Fifth Circuit's reasoning in distinguishing three types of
 2 proceedings: (1) those "arising under" Title 11; (2) those "arising in" a case under Title 11; and
 3 (3) those "related to" a case under Title 11, which are the three categories of cases over which
 4 district courts have subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b):

5 28 U.S.C. § 157(b) defines core proceedings as ones "arising under title 11, or
 6 arising in a case under title 11," and gives a nonexhaustive list of types of core
 7 proceedings. "Arising under" and "arising in" are terms of art. They are two of
 8 the three categories of cases over which district courts have jurisdiction under 28
 9 U.S.C. § 1334(b). The third category includes cases "related to" a case under title
 10 11. As the Fifth Circuit has explained,

12 Congress used the phrase "arising under title 11" to describe those
 13 proceedings that involve a cause of action created or determined by a
 14 statutory provision of title 11 The meaning of "arising in"
 15 proceedings is less clear, but seems to be a reference to those
 16 "administrative" matters that arise only in bankruptcy cases. In other
 17 words, "arising in" proceedings are those that are not based on any right
 18 expressly created by title 11, but nevertheless, would have no existence
 19 outside of the bankruptcy.

20 The court concluded: "If the proceeding does not invoke a substantive right
 21 created by the federal bankruptcy law and is one that could exist outside of
 22 bankruptcy it is not a core proceeding; it may be related to the bankruptcy because
 23 of its potential effect, but . . . it is an 'otherwise related' or non-core proceeding."

24 *In re Eastport Assocs.*, 935 F.2d 1071, 107677 (9th Cir. 1991) (citations omitted) (quoting *In re
 25 Wood*, 825 F.2d 90, 9697 (5th Cir. 1987) (footnotes omitted)).

26 Upon motion or *sua sponte*, a district court may withdraw, in whole or in part, any case
 27 or proceeding under § 157. 11 U.S.C. § 157(d). A district court must upon timely motion
 28 withdraw a proceeding if it determines "that resolution of the proceeding requires consideration
 29 of both title 11 and other laws of the United States regulating organizations or activities affecting
 30 interstate commerce ." *Id.* The party moving for withdrawal has the burden of persuasion. *See In
 31 re First Alliance Mortg. Co.*, 282 B.R. 894, 902 (C.D.Cal. 2001).

32 Although a bankruptcy court may not finally determine non-Title 11 issues, the presence
 33 of such an issue does not mandate withdrawal of the reference. *In re Vicars Ins. Agency*, 96 F.3d
 34

1 949, 953 (7th Cir. 1996). Rather, withdrawal is mandatory “in cases requiring material
 2 consideration of non-bankruptcy federal law.” *Sec. Farms*, 124 F.3d at 1008. Put differently,
 3 “mandatory withdrawal is required only when those issues require the interpretation, as opposed
 4 to mere application, of the non-title 11 statute, or when the court must undertake analysis of
 5 significant open and unresolved issues regarding the non-title 11 law.” *Id.* at 954. Permissive
 6 withdrawal is allowed, however, “for cause shown,” 11 U.S.C. § 157(d), which a district court
 7 determines by considering “the efficient use of judicial resources (which is enhanced when non-
 8 core issues predominate), delay and costs to the parties, uniformity of bankruptcy administration,
 9 the prevention of forum shopping, and other related factors.” *Sec. Farms*, 124 F.3d at 1008.

10 III. ANALYSIS

11 The Bankruptcy Court noted that the garnishees had filed an interpleader complaint in
 12 this Court (previously pending before Judge Gordon, but since transferred to this Court) as to
 13 funds sought to be garnished and reasoned that withdrawal of the reference would be appropriate
 14 because the parties will be litigating over the same funds in the present adversary proceeding and
 15 in the interpleader action. Both the efficient use of judicial resources and the avoidance of
 16 inconsistent rulings counseled in favor of withdrawal. The Court agrees. The Court will
 17 therefore grant the motion to withdraw the reference and stay the case pending the outcome of
 18 the interpleader action. The interpleader device is the more efficient method by which to resolve
 19 the rights of all parties to the disputed funds. Once the Plaintiff in Interpleader deposits the
 20 funds and is dismissed, the garnishment issue will become moot. On the other hand, an earlier
 21 judgment against the garnishees in the present action could leave them facing rival claims to the
 22 same common funds from other Defendants in Interpleader.
 23
 24

///

///

///

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Withdraw the Reference (ECF No. 1) is GRANTED.

IT IS FURTHER ORDERED that the case is STAYED.

IT IS SO ORDERED.

Dated this 28th day of May, 2014.

ROBERT C. JONES
United States District Judge

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10 **UNITED STATES BANKRUPTCY COURT**
DISTRICT OF NEVADA

11 In re

12 DOUBLE JUMP, INC.

13 Debtor.

14 X Affects DC Solar Solutions, Inc.
 15 X Affects DC Solar Distribution, Inc.
X Affects DC Solar Freedom, Inc.
 16 X Affects Double Jump, Inc.

Lead Case No.: BK-19-50102-gs
 (Chapter 7)
 Substantively Consolidated with:

19-50130-gs	DC Solar Solutions, Inc.
19-50131-gs	DC Solar Distribution, Inc.
19-50135-gs	DC Solar Freedom, Inc.

17 CHRISTINA W. LOVATO,

18 Plaintiff,

19 v.

20 NIXON PEABODY LLP,

21 Defendant.

Adversary No.: 21-05072-gs

22 **TRUSTEE'S RESPONSE IN OPPOSITION**
TO MOTION TO WITHDRAW
REFERENCE [ECF No. 17]

23 Hearing: February 18, 2022

Time: 9:30 a.m.

24 Christina Lovato, the trustee (“**Trustee**” or “**Plaintiff**”) for the chapter 7 estates of DC Solar
 25 Solutions, Inc., DC Solar Distribution, Inc., DC Solar Freedom, Inc., and Double Jump, Inc. (“**DC**
Solar”) responds in opposition to Nixon Peabody LLP’s (“**Nixon**”) motion to withdraw the
 26 reference (“**Motion**”) [ECF No. 17]. Nearly three years ago, Nixon consented to the Bankruptcy
 27 Court’s exclusive equitable jurisdiction to enter final orders in this adversary proceeding (“**Nixon**
 28 **AP**”). Nixon’s efforts to forum shop should be rejected.

1 **I. The Trustee's Claims Against Nixon Peabody**

2 Nixon attempts to distract by challenging the merits of the Trustee's complaint ("*Nixon*
 3 *Complaint*"). Motion, pgs. 3-4. While the merits are not at issue in the Motion, the Trustee
 4 responds in part as follows.

5 First, the Ninth Circuit in *F.D.I.C. v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995)
 6 (adopting in relevant part its opinion at 969 F.2d 744 (9th Cir. 1992)) ruled that a receiver for an
 7 entity stated a claim against the entity's former law firm for malpractice where the law firm's
 8 professional services included assisting the entity in raising money from investors through
 9 syndications and PPMs. The Ninth Circuit held that even though the entity's insiders were
 10 wrongdoers, "[p]art and parcel of effectively protecting a client, and thus discharging the
 11 attorney's duty of care, is to protect the client from the liability which may flow from promulgating
 12 a false or misleading offering to investors." 969 F.2d at 749. "[The entity] was the client here, not
 13 [the wrongdoing insiders]," and the law firm failed to protect its entity-client. *Id.* at 750.

14 Second, in *Donell v. Nixon Peabody LLP*, 2012 WL 3839402 (C.D. Cal. Sept. 5, 2012), the
 15 district court ruled that the receiver for an entity stated a claim against the entity's former law firm,
 16 Nixon Peabody, for breach of fiduciary duty and malpractice. The receiver alleged that Nixon
 17 failed to perform proper due diligence and wrongly helped the entity's insider raise money from
 18 investors in a manner which violated the law and representations to investors, causing the entity
 19 damages including by: (1) incurring liabilities to investors; (2) deepening the entity's insolvency;
 20 and (3) helping the entity violate the law. *Id.* at *1, 5-6.

21 Third, Nixon claims that the Trustee alleges that it merely kept silent about the Carpoft
 22 Ponzi Scheme, that other professionals also acted wrongfully, and Nixon's misconduct should be
 23 pardoned because of the affirmative defense of *in pari delicto*. This is all wrong. Nixon did not
 24 simply remain silent - Nixon closed hundreds of millions of dollars in transactions knowing they
 25 would harm its client DC Solar and help Carpoft deceive third parties. Moreover, any misconduct
 26 by others does not condone Nixon's misconduct. And finally, *in pari delicto* does not excuse
 27 Nixon's misconduct and in any event is inapplicable for multiple legal and factual reasons that the
 28 Trustee will address in detail in due course.

1 **II. Introduction**

2 In March 2019, Nixon filed claim number 34-1 (“**Nixon POC**”) to seek an affirmative
 3 recovery from the DC Solar bankruptcy estate for the value of the pre-petition “legal services” it
 4 provided to DC Solar. The Trustee met Nixon’s POC with counterclaims seeking disallowance of
 5 the Nixon POC, recovery of fraudulent transfers, and damages in tort. The Trustee’s claims are
 6 intertwined with and logically related to those for which Nixon seeks to recover from the estate.

7 The Nixon AP is statutorily core. Nixon consented to this Bankruptcy Court’s entry of final
 8 orders. Nixon waived any jury trial right. And notwithstanding Nixon’s dismissive statements,¹
 9 this Bankruptcy Court has years of experience regarding the Carpoft Ponzi Scheme (defined
 10 below) and the matters in these Bankruptcy Cases, including other adversary proceedings. The
 11 Trustee and the DC Solar estate will suffer delay and expense if the reference is withdrawn.

12 Nixon has failed to meet its burden and the Motion should be overruled.

13 **III. The Nevada District Court’s LBA Order is Instructive**

14 Nixon is not the first in these Bankruptcy Cases to seek to withdraw the reference. The
 15 Nevada District Court recently denied that relief sought by another adversary-defendant (“**LBA**
 16 **Order**”). See Exhibit 1.² While not directly on-point, the district court’s analysis is instructive.

17 In *LBA*, the Trustee brought a fraudulent transfer action against a defendant that did not
 18 file a proof of claim. The defendant sought to withdraw the reference immediately and the Trustee
 19 argued that withdrawal was appropriate when the proceeding was trial-ready. In the LBA Order,
 20 the district court discussed *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014), which
 21 approved of the “division of labor” between bankruptcy courts and district courts.³ Noting first
 22 that the Trustee had brought a *Stern* claim, *i.e.*, a claim which is statutorily core but cannot be
 23 adjudicated to final judgment by the bankruptcy court without consent, the Nevada District Court
 24

25 ¹ Nixon claims that: “the bankruptcy court’s prior knowledge regarding DC Solar’s assets and
 26 bankruptcy petition will have **limited value** in this matter...” Motion, 1:14-15 (emphasis added).

27 ² *Lovato v. LBA Realty Fund II-Company I, LLC*, 21-00134 (D. Nev) [ECF No. 13].

28 ³ n.8; see also *In re Swift Air, LLC*, 2019 WL 1266100, *4 (Bankr. D. Ariz. Mar. 15, 2019) (“The
 29 Court in *Stern* made clear that the question presented in that case (a bankruptcy court’s authority
 30 to rule on state law counterclaims) was narrow and that the holding did not meaningfully alter the
 31 division of labor between district courts and bankruptcy courts under the current statute.”).

1 found that the reference should remain until the adversary is trial-ready. The Nevada District Court
 2 reasoned in part that:

3 [B]ankruptcy judges are particularly adept at adjudicating core bankruptcy
 4 claims, and the Article III court benefits from their expertise. See *In re EPD*
 5 *Inv. Co. LLC*, Case No. CV 13-05536 SJO, 2013 WL 5352953, at *6 (C.D. Cal.
 6 Sept. 24, 2013) (“Having the bankruptcy court submit proposed findings of fact and
 7 conclusions of law in fraudulent conveyance cases ‘promotes judicial economy and
 8 efficiency by making use of the bankruptcy court’s unique knowledge of Title 11
 9 and familiarity with the actions before them.’” (quoting *In re Heathcentral.com*,
 10 504 F.3d 775, 787-88 (9th Cir. 2007)). While there may ultimately be some
 11 duplication of efforts by leaving the reference in place until the Adversary is
 12 ready for final adjudication, there are also considerable benefits for the fair
 13 administration of the Adversary for core matters to be handled in the
 14 bankruptcy court.⁴

15 The Nevada District Court continued that: (1) overlapping issues in the LBA adversary and other
 16 adversaries pending before the Bankruptcy Court; and (2) the policies of uniformity of bankruptcy
 17 proceeding and centralization of disputes; weigh in favor of denying withdrawal of the reference
 18 until the LBA adversary is trial-ready.

19 IV. General Background

20 A. The Carpoff Ponzi Scheme

21 From no later than CY 2012 through December 2018, Jeff Carpoff perpetrated a billion-
 22 dollar *Ponzi* scheme through and upon DC Solar (“**Carpoff Ponzi Scheme**”).⁵ Carpoff perpetrated
 23 the Carpoff Ponzi Scheme in connection with tax advantaged transactions, where DC Solar offered
 24 investors the opportunity to “buy” – without taking possession – certain mobile solar generators
 25 (“*MSGs*”) in exchange for an eight-or-nine figure investment.⁶

26 B. Nixon’s Role as Counsel to DC Solar, Generally

27 ⁴ LBA Order, pg. 5 (emphasis added).

28 ⁵ Nixon Complaint, ¶ 27; Order Granting Trustee’s Motion for Substantive Consolidation [Main
 29 Bankruptcy Case, ECF No. 2613] (“**Sub-Con Order**”), ¶¶13-15 (finding a Ponzi-like scheme).

⁶ Nixon Complaint, ¶¶ 15-31; Sub-Con Order, ¶¶3-4.

1 From October 2010 to December 2018, Nixon was DC Solar's outside counsel⁷ with a
 2 broad scope of representation.⁸ Among other things:

3 From October 2010 to December 2018, Nixon continuously served as Solutions'
 4 and Distribution's outside counsel closing more than \$2 billion in transactions. Led
 5 by senior partner Mr. Milder, a nationally recognized expert in the billion-dollar
 6 marketplace for renewable energy transactions, Nixon educated, counseled, and
 7 directed Solutions and Distribution in connection with Solutions' sponsoring over
 8 thirty tax equity transactions, and related matters.

9 Solutions and Distribution relied heavily on Nixon, given their lack of meaningful
 10 experience in sophisticated business transactions, let alone the specialized area of
 11 tax equity. Nixon: (1) taught Solutions and Distribution what to do and how to do
 12 it, including structuring the investments and transactions; (2) performed tax,
 13 corporate, and securities-related professional services; (3) marketed the investment
 14 opportunity to potential investors; and (4) vouched for Solutions, Distribution,
 15 Carpoft, and the investment in the marketplace.⁹

16 The Trustee further alleges in her Nixon Complaint (in summary and in part) that:

- 17 (1) Arising from the attorney-client relationship, Nixon owed DC Solar fiduciary duties
 18 and duties of good faith and care, and otherwise.¹⁰
- 19 (2) Nixon breached those duties, including by failing to protect its clients, harming its
 20 clients, and violating mandatory Rules of Professional Conduct.¹¹
- 21 (3) Nixon identified Red Flags and should have known and then actually knew (by no later
 22 than a series of events from April 2016 - March 2, 2017) that Carpoft was injuring DC
 23 Solar – its clients – through the complex tax equity transactions which Nixon
 24 structured, taught DC Solar to implement, and managed and oversaw.¹²
- 25 (4) Nixon committed, assisted, and joined Carpoft's wrongdoing by representing DC Solar
 26 in and closing tax equity transactions which Nixon knew would harm DC Solar and
 27 misleading other parties related to the transactions.¹³

28 ⁷ The Trustee's complaint alleges that Nixon's clients included Solutions and Distribution (and
 29 other Carpoft-affiliated entities). In its court papers, Nixon identifies its clients as "DC Solar."
 30 [See e.g., ECF No. 2985, pg. 2:17.] In the interests of brevity and consistency, the Trustee uses
 31 Nixon's language and identifies Nixon's client as "DC Solar".

32 ⁸ Nixon Complaint (defined below), Heading E and ¶¶ 73-124; ¶¶ 252, 264, & 278.

33 ⁹ Nixon Complaint, ¶¶ 3 & 4.

34 ¹⁰ Nixon Complaint, ¶¶ 5, 7, 248, 253-55, 265-68, 283, 285, 292-95, 311, 318, & 327.

35 ¹¹ Nixon Complaint, ¶¶ 5, 7, 61, 75, 227, 248, 257, 270, 283-84, 301, 311, 318, & 327.

36 ¹² Nixon Complaint, ¶¶ 5-6; Headings V.F & V.G; ¶¶ 125-211; 257, 270, 281, & 296.

37 ¹³ Nixon Complaint, ¶¶ 5-7; Heading V.H & V.I; ¶¶ 212-23; 257, 270, 282, & 301.

1 C. The Bankruptcy Cases

2 Following a December 2018 law enforcement raid¹⁴ and the removal of Carpoft from any
 3 decision-making role, in early 2019 DC Solar filed voluntary petitions commencing the bankruptcy
 4 cases (“***Bankruptcy Cases***”). On March 20, 2019, this Court converted the cases to chapter 7.¹⁵
 5 On March 22, 2019, the Trustee was appointed.¹⁶

6 The Bankruptcy Court has presided over numerous matters during the past three years,
 7 including: (1) conversion of these cases; (2) discovery disputes;¹⁷ (3) DC Solar’s interests in
 8 thousands of MSGs;¹⁸ (4) sale of MSGs and allocation of the sale proceeds;¹⁹ (5) establishment of
 9 a protocol to take F.R.B.P. 2004 examinations remotely due to COVID-19;²⁰ (6) liquidation and
 10 allowance of hundreds of millions of dollars of claims of investors; and (7) consideration and
 11 approval under F.R.B.P. 9019 of the Trustee’s settlements of tort or avoidance claims against: (i)
 12 financial institutions; (ii) accountants; and (iii) DC Solar investors.²¹ And the Bankruptcy Court
 13 considered and ordered the substantive consolidation of the DC Solar estates pursuant to 11 U.S.C.
 14 § 105, making wide ranging findings of fact and conclusions of law in the process.²²

15 D. The Nixon POC, the Nixon Complaint, and Other Adversary Proceedings

16 1. The Nixon POC

17 Nearly three years ago, Nixon filed its POC to obtain an affirmative recovery of
 18 \$111,223.95 from the DC Solar estate. Nixon states in its POC (part 2 question 8) that the “*basis*
 19 of the claim” is Nixon’s pre-petition “*legal services*” to DC Solar.

20 Nixon completed part 2 question 8 of its Nixon POC by attaching documentary support
 21 pursuant to F.R.B.P. 3001. Nixon attached its account statement (“***Account Statement***”),

22 ¹⁴ Nixon Complaint, ¶ 39; Sub-Con Order, ¶16.

23 ¹⁵ Main Case, ECF Nos. 377 & 389; *see also*, docket and e.g., ECF Nos. 106 and 239.

24 ¹⁶ Main Bankruptcy Case, ECF No. 439.

25 ¹⁷ Main Bankruptcy Case, ECF Nos. 2181, 2217, 2222 & 2313.

26 ¹⁸ *See e.g.*, Main Bankruptcy Case, ECF Nos. 773, 930, 1391, 1471, 1933, 1958, 2019 & 2020.

27 ¹⁹ Main Bankruptcy Case, ECF No. 2614.

28 ²⁰ Main Bankruptcy Case, ECF Nos. 1734, 1770, 1778, 1781, 1790, 1795 & 1831.

29 ²¹ Main Bankruptcy Case, ECF Nos. 2444, 2537, 2481, 2530, 2614, 2803, 2790.

30 ²² Main Bankruptcy Case, ECF Nos. 2324, 2415, 2417 & 2613 (Sub-Con Order).

1 identifying: (1) three invoices sent to Solutions; (3) the amounts billed and due and owing for each
2 of the three invoices; (4) Nixon’s “*Client Attorney*” – Richard Cogen, Esq.; and (5) Nixon’s “*Client*
3 *No.*”: 059202. Nixon’s Account Statement states that (emphasis in original): “THESE INVOICES
4 ARE FOR LEGAL SERVICES ...”.

²³ Nixon never had any engagement agreement with DC Solar.

2. The Trustee's Nixon Complaint

On October 25, 2021, after investigating the legal services Nixon provided to DC Solar, the Trustee filed her Nixon Complaint based on Nixon's misconduct in providing those legal services and its attorney-client relationship. The Trustee sets forth specific allegations detailing Nixon's duties and breach of duties, including: (1) how and when Nixon acquired actual knowledge that Jeff Carpooff was deceiving investors and harming DC Solar; and (2) how and when Nixon knowingly and actively assisted Jeff Carpooff in his misconduct.

3. The Trustee's Other Adversary Proceedings

To date, the Trustee has filed 40+ adversary proceedings before the Bankruptcy Court and in the Bankruptcy Cases.²⁴ The Trustee intends to file additional claims sounding in tort and avoidance. In most of the filed adversary proceedings, the Trustee’s claims sound in avoidance but some include tort claims.²⁵ All of the Trustee’s adversary proceedings involve overlapping factual issues, such as (1) the Carpoft Ponzi Scheme and its breath, purpose, and scope; (2) DC Solar’s financial position at different times; (3) the roles of Carpoft and other wrongdoing (and innocent) insiders and outsiders; and (4) the roles of outside professionals and advisors.

Defendants have asserted a wide variety of defenses. Some avoidance-defendants argue that their “good faith” is evidenced by the DC Solar’s professionals’ (e.g., Nixon) involvement in the tax equity transactions.²⁶

²³ Nixon Complaint, ¶¶ 5, 60.

²⁴ See generally, docket.

²⁵ See e.g., Adv. Case No. 21-5031-gs (Count I for breach of fiduciary duty); Adv. Case No. 21-5040-gs (Count V for conversion).

²⁶ See e.g., Main Case ECF No. 2995, pg. 7:9-13.

1 V. The Reference Should Not Be Withdrawn

2 A. Nixon's POC is Not Merely Analogous to, But in Fact Exceeds, Nixon's Filing of a
 3 Complaint Against the DC Solar Bankruptcy Estate

4 “By filing its Nixon POC, Nixon “asserted a right to bankruptcy estate assets.”²⁷ Nixon’s
 5 POC is analogous to Nixon having filed a civil complaint against the DC Solar bankruptcy estate,
 6 and the Trustee’s Nixon Complaint is analogous to an answer and counterclaim.²⁸

7 But “[f]iling a proof of claim is not merely a series of allegations based on information and
 8 belief, which if true, might support the relief requested (such as when filing a complaint). The
 9 filing of a proof of claim is much more significant and the statements therein are provided with,
 10 and subject to, higher standards.”²⁹

11 Nixon’s POC well exceeds a simple complaint because: (1) it was sworn-to, akin to a
 12 verified complaint;³⁰ and (2) Nixon attached documentary support, *i.e.*, the Account Statement,
 13 satisfying its *prima facie* burden to prove the validity and amount.³¹ Nixon took advantage of the
 14 Bankruptcy Rules (F.R.B.P. 3001) to secure an evidentiary presumption of entitlement to recovery
 15 from the estate, shifting the burden to the Trustee.³² And Nixon took advantage of the Bankruptcy
 16 Code to secure allowance of the Nixon POC, unless and until objected-to. 11 U.S.C. § 502(a).

17 B. The Standard

18 The U.S. District Court for the District of Nevada refers all cases arising under, in, or
 19 related to the Bankruptcy Code cases under the Bankruptcy Code to the U.S. Bankruptcy Court.³³
 20 Here, Nixon seeks permissive withdrawal, *i.e.*, for “cause,” under 28 U.S.C. §157(d).

22
 23 ²⁷ *In re Legendary Field Exh., LLC*, 2020 WL 211409, *4 (Bankr. W.D. Tex. Jan. 13, 2020).

24 ²⁸ *In re Brosio*, 505 B.R. 903, 912 (B.A.P. 9th Cir. 2014) (citing cases).

25 ²⁹ *In re Borre*, 2019 WL 1012788, *12 (Bankr. E.D. Cal. Mar. 1, 2019); *see also Matter of Wood*,
 26 825 F.2d 90, 97 (5th Cir. 1987) (“The filing of the proof [of claim] invokes the special rules of
 27 bankruptcy concerning objections to the claim, estimation of the claim for allowance purposes,
 28 and the rights of the claimant to vote on the proposed distribution.”).

29 ³⁰ *In re Garner*, 246 B.R. 617, 622 (B.A.P. 9th Cir. 2000) (“In short, a proof of claim executed by
 30 an attorney has an evidentiary effect similar to that of a verified complaint.”)

31 ³¹ F.R.B.P. 3001; *Garner*, 246 B.R. at 622.

32 ³² *Id.* at 620 & 622.

33 ³³ Local Rules of Bankruptcy Practice, D. Nev. (“**Local Rules**”) §1001(b)(1).

1 “In determining whether cause exists, a district court should consider the efficient use of
 2 judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the
 3 prevention of forum shopping, and other related factors.”³⁴ Although courts had traditionally
 4 begun the analysis by determining whether a claim is “core” or “non-core,” post *Stern*, “the more
 5 relevant question is whether the bankruptcy court has the constitutional authority to enter final
 6 judgment on the claim at issue.”³⁵

7 C. Nixon Bears The Burden on its Motion

8 Nixon bears the burden to show that the reference should be withdrawn.³⁶ The standard is
 9 “high,” and relief is granted only “in a limited number of circumstances.”³⁷

10 D. The Nixon AP is a Core Proceeding, and the Bankruptcy Court Has the Constitutional
 11 Authority to Enter Final Orders Due to Nixon’s Consent

12 In the Nixon AP, the Trustee seeks to (1) disallow the Nixon POC; (2) avoid and recover
 13 fraudulent transfers; and (3) recover for state law claims arising from wrongdoing in connection
 14 with Nixon’s legal services. These are all “core” matters.

- 15 • The Trustee’s claim to disallow the Nixon POC (Count VIII) is core.³⁸
- 16 • The Trustee’s avoidance claims (Counts V-VII) are statutorily core.³⁹
- 17 • The Trustee’s tort claims (Counts I-IV) are statutorily core.⁴⁰

21 ³⁴ *Hoffman v. Sonoma Specialty Hosp., LLC*, 2020 WL 3402230, *3 (N.D. Cal. June 19, 2020),
 22 rec’d denied, 2020 WL 9422402 (N.D. Cal. Aug. 5, 2020).

23 ³⁵ *In re Hoku Corp.*, 2015 WL 7295445, *2 (D. Idaho Nov. 18, 2015); see also *In re White Star
 Petroleum Holdings, LLC, et al.*, 2021 WL 5875441, *11 (Bankr. W.D. Okla. Dec. 10, 2021).

24 ³⁶ EPD, 2013 WL 5352953, *6.

25 ³⁷ *Id.* at *5; *Mortg. Store*, 464 B.R. at 428.

26 ³⁸ 28 U.S.C. § 157(b)(2)(B).

27 ³⁹ 28 U.S.C. § 157(b)(2)(A), (B), (C), & (H); see also *White Star*, 2021 WL 5875441, *5
 28 (fraudulent transfer claims under Section 548 of the Code and state law analog are core).

⁴⁰ 28 U.S.C. § 157(b)(2)(A), (B), (C), & (O); see also *In re Venoco, LLC*, 596 B.R. 480, 490
 (Bankr. D. Del. 2019), aff’d, 610 B.R. 239 (D. Del. 2020), aff’d sub nom. 998 F.3d 94 (3d Cir.
 2021) (“**Estate counterclaims against persons filing claims is a category enumerated as
 providing core ‘arising in’ jurisdiction.**”) (emphasis added).

1 As a constitutional matter, the Trustee's statutorily core claims for avoidance and tort are
 2 *Stern* claims and may be finally adjudicated by this Bankruptcy Court with consent.⁴¹ Here, Nixon
 3 consented by filing its Nixon POC. *See In re EPD Inv. Co., LLC*, 821 F.3d 1146, n.2 (9th Cir.
 4 2016) (Relying on the Supreme Court's decision in *Wellness*, "Poshow filed a proof of claim on
 5 behalf of the trust and has, accordingly, consented to bankruptcy court jurisdiction.").⁴²

6 In *In re CBI Holding Co., Inc.*, 529 F.3d 432 (2d Cir. 2008), the Second Circuit held that
 7 the trustee's claims (e.g., professional negligence) against the debtors' pre-petition professional
 8 were "core" because the trustee's claim for disallowance of the pre-petition professional's proof
 9 of claim directly implicated whether the firm's proof of claim against the estate should be allowed
 10 or disallowed, and further, the trustee's claims were related to the professional services rendered
 11 for which firm sought compensation in its proof of claim.⁴³

12 Similarly, in the Ninth Circuit the scope of the claimant's consent to Bankruptcy Court
 13 jurisdiction is guided by the scope of the claimant's proof of claim. *See In re G.I. Indus., Inc.*, 204
 14 F.3d 1276 (9th Cir. 2000); *In re PNP Holdings Corp.*, 184 B.R. 805, 806 (B.A.P. 9th Cir. 1995),
 15 aff'd, 99 F.3d 910 (9th Cir. 1996) ("It is well settled that a creditor consents to jurisdiction over
 16 related counterclaims by filing a proof of claim.") (citing cases).

17 **This power to allow or to disallow claims includes full power to inquire into
 18 the validity of any alleged debt or obligation of the bankrupt upon which a
 19 demand or a claim against the estate is based. This is essential to the
 performance of the duties imposed upon it.**

20 *Katchen v. Landy*, 382 U.S. 323 (1966) (citations and quotations omitted, emphasis added).

21 In *G.I. Indus.*, the Ninth Circuit ruled that a claimant's proof of claim attaching the
 22 agreement between the claimant and the debtor converted a non-core breach of contract claim into
 23 a core proceeding.⁴⁴ The claimant triggered the claims-allowance process, an exercise of the

24 ⁴¹ *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015).

25 ⁴² *See also S.E.C. v. Ross*, 504 F.3d 1130, 1149 (9th Cir. 2007) ("[T]he parties may consent to
 26 jurisdiction through ... filing a proof of claim in a bankruptcy proceeding ...) (citations omitted);
In re MacGibbon, 2006 WL 6810964, *9 (B.A.P. 9th Cir. Oct. 4, 2006) ("Once a creditor files a
 27 proof of claim, he voluntarily submits himself to the core jurisdiction of the bankruptcy court.").

28 ⁴³ *See also In re McClelland*, 332 B.R. 90 (Bankr. S.D.N.Y. 2005); *In re Frost, Inc.*, 145 B.R. 878
 (Bankr. W.D. Mich. 1992).

⁴⁴ 204 F.3d 1276.

1 bankruptcy court's core jurisdiction, to determine the claim's validity and amount which extended
 2 to "examining the contract itself and the circumstances surrounding its formation."⁴⁵

3 Thus, the district court correctly concluded that the determination of the validity of
 4 the contract for the purposes of disallowing the 502(g) based claim, is basically a
 5 non-core issue of state breach of contract being subsumed into a core
 6 proceeding (regarding allowance of claim) and thereby coming under the
 7 jurisdiction of the bankruptcy court.

8 204 F.3d at 1280 (emphasis added); see also *Ta Chong Bank Ltd. v. Hitachi High Techs. Am., Inc.*,
 9 610 F.3d 1063, 1068 (9th Cir. 2010) ("If the creditor submits an agreement with its proof of claim
 10 to provide evidentiary support of the claim, then that agreement is subject to the bankruptcy court's
 11 jurisdiction."); *Maring v. PG Alaska Crab Inv. Co., LLC*, 2007 WL 9775428, *2 (W.D. Wash. Oct.
 12 2, 2007) ("When [the defendant] filed proofs of claim with the bankruptcy court, asserting claims
 13 based on both the Loan Agreements and the failed Settlement Agreement, it voluntarily subjected
 14 the question of the validity of those claims to the jurisdiction of the bankruptcy court," and thus
 15 the defendant "has no Seventh Amendment right to a jury trial in the bankruptcy court on the
 16 validity of the Agreements and the circumstances surrounding their formation. *Langenkamp*, 498
 17 U.S. at 45; *Katchen*, 382 U.S. at 336–37; *In re G.I. Industries, Inc.*, 204 F.3d at 1279–80.").⁴⁶

18 Here, Nixon filed its Nixon POC, sworn-to and with the Account Statement, seeking an
 19 affirmative recovery from the DC Solar bankruptcy estate based on its attorney-client relationship
 20 with and legal services rendered to DC Solar. Nixon consented to the Bankruptcy Court entering
 21 final orders on this subject matter, which encompasses the Trustee's Nixon AP.

22 E. Nixon's Motion Ignores Nixon's Consent to Bankruptcy Court Jurisdiction

23 Nixon's Motion ignores its consent. If Nixon's reply seeks for the first time to address this
 24 plain deficiency, the Trustee reserves the right to respond. While Nixon asserts that the Trustee's
 25 four tort claims "are all indisputably non-core" (Motion, pg. 7:26-27), Nixon disregards 28 U.S.C.
 26 §157(b)(2)(A), (B), (C) & (O) and the long line of jurisprudence addressing consent.

27
 28 ⁴⁵ *G.I. Indus.*, 204 F.3d at 1280.

⁴⁶ See also *In re Roman Catholic Archbishop of Portland*, 2005 WL 196477, *1 (Bankr. D. Or. Jan. 28, 2005) ("[T]he effect of filing the proof of claim was to turn this into a core proceeding.").

1 Nixon argues that the Trustee's avoidance claims are "ancillary at best." Motion, pg. 8: 12-
 2 13. This is disingenuous at best. First, Nixon was advised by sophisticated bankruptcy counsel and
 3 could not have considered the claims-allowance process (including 11 U.S.C. § 502(d)) to be
 4 merely "ancillary" when it filed its POC under oath seeking estate assets. Nixon's bankruptcy
 5 counsel that signed the POC has litigated these issues.⁴⁷ Nixon knew the claims allowance process
 6 is an essential function of the Bankruptcy Court.

7 Second, Nixon's argument that the Trustee's counterclaims seek a larger recovery from
 8 Nixon than Nixon seeks from the bankruptcy estate is a red herring. A quantitative argument has
 9 no place in this qualitative (jurisdictional and consent) analysis.⁴⁸ Indeed, in *CBI*, discussed above,
 10 the Second Circuit considered and rejected defendant-claimant-E&Y's argument that the estate's
 11 eight-figure counterclaims were "disproportionate to E&Y's \$210,850 fees claim" and thus
 12 affected the analysis in some way.⁴⁹

13 In short-form, Nixon cites to the Supreme Court's decisions in *Stern* and *Exec. Benefits* in
 14 its section regarding the Trustee's fraudulent transfer claims. Motion, pg. 9:1-16. Ignoring the facts
 15 and law, Nixon boldly states it has not consented to final adjudication by this Bankruptcy Court:
 16 "*Nixon's consent – which it has not granted.*" Motion, pg. 9:13-14. But nearly three years ago
 17 Nixon filed its POC and has stood behind and maintained it since.

18

19 ⁴⁷ See *In re CHC Grp. Ltd.*, 2017 WL 1380514, *8-11 (Bankr.N.D.Tex. Mar. 28, 2017) (identifying
 20 Nixon's counsel, Robert Christmas, Esq. as defendant's counsel, and Attorney Christmas' brief in
 21 support of a motion to dismiss for lack of jurisdiction acknowledging: "*Courts recognize that by
 22 filing a proof of claim a creditor may submit itself to personal jurisdiction for counterclaims
 asserted by the debtor.*" Adv. Case No. 16-3151 (Bankr. N.D. Tex.) [ECF No. 25, pg. 21]
 23 (emphasis added); see also Reply brief [ECF No. 81, pg. 6, n. 6 & 7].

24 ⁴⁸ *In re NW Terr. Mint, LLC*, 2017 WL 568821, *4 (W.D. Wash. Feb. 13, 2017); see also *Travellers
 25 Int'l AG v. Robinson*, 982 F.2d 96, 100 (3d Cir. 1992) ("Where, as in this case, a creditor has filed
 26 a claim, even though the claim is couched in protective language and is contingent, that creditor
 27 has submitted to the bankruptcy court's equitable jurisdiction and waived any Seventh Amendment
 28 right to a jury trial."); see also *MacGibbon*, 2006 WL 6810964, *9 (B.A.P. 9th Cir. Oct. 4, 2006)
 ("Here, Richard willingly subjected himself to the bankruptcy court's jurisdiction by filing his
 claims. Once he had done so, he triggered the claims allowance process, thereby submitting
 himself to the bankruptcy court's authority. **Simply because Richard would not receive a share
 of the distribution under the plan from funds recovered from the Trust Account does not
 mean that the bankruptcy court's jurisdiction suddenly terminated.**") (emphasis added).

⁴⁹ *CBI*, 529 F.3d at 463-64.

1 Nixon states elsewhere in its Motion that the “act of filing [its motion to withdraw its proof
 2 of claim] has practically mooted” its filing of the Nixon POC. Motion, pg. 9:17-23. This is untrue.
 3 Nixon availed itself of this Bankruptcy Court, and the bankruptcy rules and statutes which govern,
 4 for its own financial benefit. Nixon cannot now escape the accompanying consequences. *See*
 5 *Katchen*, 382 U.S. at 333 n.9 (“[H]e who invokes the aid of the bankruptcy court by offering a
 6 proof of claim and demanding its allowance must abide the consequences of that procedure.”)
 7 (notations omitted); *In re Levoy*, 182 B.R. 827, 832 (B.A.P. 9th Cir. 1995) (“A creditor who offers
 8 proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and
 9 must abide the consequences.”) (quotations omitted); *PNP*, 184 B.R. at 807 (“A creditor cannot
 10 reasonably expect to invoke those portions of the bankruptcy code that allow it to recover on its
 11 claims and yet avoid the legal effect of other sections that do not work in its favor.”).

12 Nixon chose the Bankruptcy Court as the adjudicator and factfinder for the propriety of the
 13 Nixon-DC Solar attorney-client relationship and Nixon’s legal services. Nixon consented to this
 14 Bankruptcy Court’s equitable jurisdiction for this subject matter. This Bankruptcy Court has the
 15 statutory and constitutional authority to enter final orders and judgments.

16 Finally, while the Nixon AP asserts core claims and this Court has constitutional authority
 17 to enter final orders, courts in this district have rejected a defendant’s request to withdraw the
 18 reference even when that is not the case.⁵⁰

19 **F. Judicial Economy, And Delay And Costs**

20 In *EPD*, the California district court denied the defendant’s motion to withdraw the
 21 reference in an avoidance action, reasoning in part that:

22 [H]earing core matters in a district court could be an inefficient allocation of
 23 judicial resources given that the bankruptcy court generally will be more familiar
 24 with the facts and issues. **Having the bankruptcy court submit proposed**
findings of fact and conclusions of law in fraudulent conveyance cases
promotes judicial economy and efficiency by making use of the bankruptcy

25
 26⁵⁰ See e.g., *In re Access Ins. Servs., Inc.*, 2014 WL 6065641, *3 (D. Nev. Nov. 12, 2014) (“As it is
 27 undisputed that some of the Trustee’s claims are core claims that arise under title 11, and as the
 28 Court determines that the bankruptcy court may exercise supplemental jurisdiction over Plaintiffs’
 remaining claims, efficient use of judicial resources and uniformity of bankruptcy administration
 support leaving the reference in place so that all claims may proceed in the bankruptcy court.”).
citing Sec. Farms v. Int’l Bhd. of Teamsters, 124 F.3d 999, 1008 (9th Cir.1997).

court's unique knowledge of Title 11 and familiarity with the actions before them.⁵¹

The EPD court rejected that defendant's argument that unnecessary costs are avoided by withdrawal of the reference because of the district court's review, reasoning that "any inefficiency created by the need for de novo review is outweighed by other efficiencies gained in leaving the proceedings in bankruptcy court."⁵² See also LBA Order.

That is even more true here. The Nixon AP brings core claims over which this Court has the exclusive jurisdiction and constitutional authority to enter final orders. Efficiencies are gained and costs and delay are saved by having this Court hear and decide these matters.

Nixon dismisses the time and resources invested by this Bankruptcy Court in these Bankruptcy Cases. However, this Bankruptcy Court has presided over many wide-ranging matters for years, ruling on a range of issues relating to the Carpoff Ponzi Scheme, adversary proceedings, substantive consolidation, settlement approvals, and the estate's creditor body. This Bankruptcy Court is well experienced and familiar with these Bankruptcy Cases, the players, and the facts. It is far more efficient for this Court to continue to preside over these issues.

G. Uniformity Of Bankruptcy Administration

The policy of uniformity of bankruptcy administration favors denial of the Nixon’s request to withdraw the reference. The Trustee asserts in this Nixon AP – near-identical to the Trustee’s assertions in the 40+ other adversary proceedings she has brought in these Bankruptcy Cases – that Carpoft perpetrated the Carpoft Ponzi Scheme and certain transfers are avoidable and can be recovered for the benefit of the estate. Here, and in many of those other adversary proceedings, the Trustee intends to utilize the “Ponzi presumption” of insolvency.⁵³

⁵¹ *In re EPD Inv.*, 2013 WL 5352953, *6 (C.D. Cal. Sept. 24, 2013) (quotations omitted, emphasis added); see also *In re We Ins. Servs., Inc.*, 2021 WL 4150311, *3 & 4 (S.D. Cal. Sept. 13, 2021).

⁵² EPD, 2013 WL 5352953, *5 (notations omitted); see also *Healthcentral.com*, 504 F.3d at 787–88 (having the bankruptcy court hear these actions “promotes judicial economy and efficiency by making use of the bankruptcy court’s unique knowledge of Title 11 and familiarity with the actions before them”); *Access*, 2014 WL 6065641, *3.

⁵³ See e.g., *In re Nat'l Consumer Mortg., LLC*, 2013 WL 164247, *11 (D. Nev. Jan. 14, 2013).

1 Because (1) the Bankruptcy Court has already considered matters related to the Trustee's
 2 claims in this Nixon AP,⁵⁴ and is otherwise experienced with the unique issues in these Bankruptcy
 3 Cases; (2) the Trustee is prosecuting other adversary proceedings in the Bankruptcy Court with
 4 overlapping facts and claims; and (3) the Trustee's avoidance claims would not exist absent the
 5 bankruptcy;⁵⁵ "uniformity of bankruptcy administration" favors denial of Nixon's request to
 6 withdraw the reference. Indeed, "when the bankruptcy has proceeded for several years, withdrawal
 7 may undermine the uniform administration of bankruptcy proceedings."⁵⁶

8 **H. Forum Shopping**

9 Nixon is forum shopping. Nearly three years ago Nixon filed its POC seeking to have this
 10 Bankruptcy Court award an affirmative recovery of estate assets based on the quality of the pre-
 11 petition legal services it provided to DC Solar. Nixon – through bankruptcy counsel – swore to the
 12 truth of its Nixon POC, making it akin to a verified complaint. *See In re Garner*, 246 B.R. 617,
 13 622 (B.A.P. 9th Cir. 2000) ("In short, a proof of claim executed by an attorney has an evidentiary
 14 effect similar to that of a verified complaint."). Nixon attached documentary support to its Nixon
 15 POC pursuant to F.R.B.P. 3001, gaining a presumption as to entitlement and amount.⁵⁷

16 The Trustee has objected through her Nixon Complaint, as directed by F.R.B.P. 3007(b).
 17 The Nixon Complaint is a counterclaim to the Nixon POC,⁵⁸ and centers on the identical subject
 18 matter Nixon placed before this Court in its POC. Both parties, at that time, agreed to this
 19 Bankruptcy Court as the forum for adjudicating the propriety of Nixon's legal services.

20 That Nixon now strategically prefers to have this matter adjudicated elsewhere is of no
 21 moment. Nixon sought the aid of the Bankruptcy Court when it submitted the Nixon POC to obtain
 22 DC Solar estate assets. In securing the benefits provided by law (*e.g.*, 11 U.S.C. § 502 and F.R.B.P.
 23 3001), Nixon consented to the Bankruptcy Court serving as the forum and adjudicator. Nixon
 24 should not be permitted to forum shop.

25
 26 ⁵⁴ See *e.g.*, Sub-Con Order, ¶¶3-45 and ECF Nos. 2790 & 3054.

27 ⁵⁵ *Bryanna Cooper*, 2018 WL 11277403, *3.

28 ⁵⁶ *We Ins. Servs.*, 2021 WL 4150311, *4.

29 ⁵⁷ F.R.B.P. 3001(f); *Garner*, 246 B.R. at 622.

30 ⁵⁸ *In re Brosio*, 505 B.R. 903, 912 (B.A.P. 9th Cir. 2014) (citing cases).

1 **I. Centralization Of Disputes**

2 There is strong public policy favoring centralization of disputes before the Bankruptcy
 3 Court.⁵⁹ Nixon’s requested relief runs contrary to this well-settled rule. Just as the Trustee is
 4 litigating other disputes before the Bankruptcy Court, the Nixon AP should remain there as well.
 5 This increases efficiency and reduces expense to the estate and the risk of inconsistent rulings.

6 **J. Nixon Has No Right to a Jury Trial; In The Alternative, The Reference Should Be
 7 Withdrawn Only When The Nixon AP Is Trial-Ready**

8 While Nixon filed a demand for jury trial [ECF No. 16], the Trustee has moved to strike it
 9 as Nixon forfeited any jury trial right by filing its POC. See Sections V.D & V.E above, and the
 10 Trustee’s contemporaneously-filed motion to strike, which discuss that: (1) the time-of-filing rule
 11 directs that this Court’s jurisdiction is determined as of the commencement of the Nixon AP;⁶⁰ and
 12 (2) Nixon forfeited any jury trial right by filing its POC seeking a recovery from the DC Solar
 13 bankruptcy estate on the same or related subject matter as the Trustee’s Nixon AP.⁶¹

14 But even if Nixon had not filed its POC three years ago and forfeited any jury trial right,
 15 that would merely demonstrate “cause” to withdraw the reference *when the matter is trial-ready*,
 16 not in its earlier stages. First, the Local Rules have set a procedure for just this situation, whereby
 17 this Bankruptcy Court handles all matters in an adversary until it is ready for a jury trial.

18 **Consent and withdrawal.** Upon the court’s determination that the demand was
 19 timely made and the party has a right to a jury trial, and if all parties have not filed

20 ⁵⁹ *In re Eber*, 687 F.3d 1123, 1131 (9th Cir. 2012); *Balboa Cap. Corp. v. Siddiqui Transitions*

21 *MHT LLC*

22 , 2017 WL 7806635, *3 (C.D. Cal. Aug. 23, 2017) (identifying the “strong public policy
 23 favoring centralization of bankruptcy proceedings in a bankruptcy court”).

24 ⁶⁰ *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570–71 (2004); *In re Casamont Invs., Ltd.*, 196 B.R. 517, 521 (B.A.P. 9th Cir. 1996) (“Jurisdiction is determined as of the commencement of the action.”) citing *In re Fietz*, 852 F.2d 455, n.2 (9th Cir. 1988); see also *Double Eagle Energy Servs., LLC v. MarkWest Utica EMG, LLC*, 936 F.3d 260, 263 (5th Cir. 2019); *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 597 B.R. 466, 477 (Bankr. S.D.N.Y. 2019), leave to appeal denied sub nom. 612 B.R. 257 (S.D.N.Y. 2020) (a claimant’s withdrawal of a proof of claim after the trustee files an adversary proceeding (counterclaim) against that claimant has no effect on the Bankruptcy Court’s jurisdiction) (citing many cases).

25 ⁶¹ *Langenkamp v. Culp*, 498 U.S. 42 (1990); *Katchen v. Landy*, 382 U.S. 323, 334–35 (1966); *In re G.I. Industries*, 204 F.3d 1276, 1280 (9th Cir. 2000); *In re Advanced Rods, Inc.*, 2005 WL 6960214 (B.A.P. 9th Cir. June 27, 2005); *In re Smith*, 389 B.R. 902, 916 (Bankr. D. Nev. 2008); see also *In re CBI Holding Co., Inc.*, 529 F.3d 432 (2d Cir. 2008); *In re GYPC, Inc.*, 2021 WL 5016129 (Bankr. S.D. Ohio Oct. 25, 2021); *Madoff*, 597 B.R. 466.

1 a written consent or consented on the record to a jury trial in the bankruptcy court,
 2 the bankruptcy court will certify the matter to the district court. Upon certification,
 3 the district court will open a new civil matter, and will assign a date for trial. **Unless
 the assigned judge orders otherwise, all proceedings will continue in the
 bankruptcy court until the matter is ready for trial.**⁶²

4 Second, Ninth Circuit law contemplates and approves that the reference is appropriately
 5 withdrawn when the adversary is trial-ready. In *Healthcentral.com*, the Ninth Circuit concluded:
 6 “Universally these courts have all reached the same holding, that is, a Seventh Amendment jury
 7 trial right does not mean that bankruptcy courts must instantly give up jurisdiction and that the
 8 case must be transferred to the district court.”⁶³ Rather, the bankruptcy court should retain
 9 jurisdiction over the pre-trial proceedings, reasoning as follows:

10 First, allowing the bankruptcy court to retain jurisdiction over pre-trial matters,
 11 does not abridge a party’s Seventh Amendment right to a jury trial.... A bankruptcy
 12 court’s pre-trial management will likely include matters of “discovery,” “pre-trial
 13 conferences,” and routine “motions,” which obviously do not diminish a party’s
 14 right to a jury trial. Moreover, even if a bankruptcy court were to rule on a
 15 dispositive motion, it would not affect a party’s Seventh Amendment right to a jury
 16 trial, as these motions merely address whether trial is necessary at all.

17 Second, requiring that an action be immediately transferred to district court simply
 18 because of a jury trial right would **run counter to our bankruptcy system**. Under
 19 our current system Congress has empowered the bankruptcy courts to “hear” Title
 20 11 actions, and in most cases enter relevant “orders.” **As has been explained
 before, this system promotes judicial economy and efficiency by making use of
 the bankruptcy court’s unique knowledge of Title 11 and familiarity with the
 actions before them. Accordingly, if we were to require an action’s immediate
 transfer to district court simply because there is a jury trial right we would
 effectively subvert this system. Only by allowing the bankruptcy court to
 retain jurisdiction over the action until trial is actually ready do we ensure that
 our bankruptcy system is carried out.**⁶⁴

21 CONCLUSION

22 The Trustee has the exclusive authority to bring the Nixon AP for the benefit of the estate.
 23 She commenced the Nixon AP in this Bankruptcy Court, challenging Nixon’s POC head-on. Nixon
 24 has consented to this Court’s entry of final orders in the Nixon AP, a statutorily core proceedings
 25 for which the Bankruptcy Court has constitutional authority to finally adjudicate. And Nixon has
 26 no jury trial right.

27 _____
 28 ⁶² Local Rule 9015(e) (emphasis added).

⁶³ 504 F.3d 775, 787 (9th Cir. 2007) (citing cases, emphasis added).

⁶⁴ *Id.* (internal citations omitted and emphasis added).

Moreover, the Trustee has asserted dozens of other adversary proceedings in the Bankruptcy Court seeking overlapping relief and addressing overlapping factual circumstances. The Bankruptcy Court has presided over a wide range of other DC Solar-related matters over the past three years, developing unique and specialized familiarity over these and other bankruptcy issues in entering substantive and procedural rulings.

6 Nixon fails to satisfy its heavy burden to withdraw the reference and its efforts to forum
7 shop should be denied.

8 **WHEREFORE**, Plaintiff respectfully requests that the Court deny Nixon's request to
9 withdraw the reference, or in the alternative, deny the request until the Nixon AP is trial-ready,
10 and grant further relief as the Court deems just and proper.

11 DATED: January 14, 2022.

HARTMAN & HARTMAN

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MELAND BUDWICK, P.A.

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CERTIFICATE OF SERVICE

I certify that on January 14, 2022, I caused to be served the above-named document as indicated below:

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I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 14, 2022.

/s/ Michael S. Budwick
Michael S. Budwick, Esq.

1

2

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

6 In re DOUBLE JUMP, INC.

Case No. 3:21-cv-00134-MMD

7 Debtor.

ORDER

8 CHRISTINA W. LOVATO,

Lead Case No. BK-S-19-50102-gs

9 Plaintiff,

Adversary Case No. 21-0507-gs

10 v.

11 LBA REALTY FUND II-COMPANY I, LLC,

12 Defendant.

13

I. SUMMARY

This action involves an adversary proceeding related to a bankruptcy case. Defendant LBA Realty Fund II-Company I LLC (“LBA”) moves to withdraw reference of the adversary proceeding from the bankruptcy court so that this action may be heard by the district court. (ECF No. 1 (“Motion”).) LBA further requests that after withdrawing the reference, this Court transfer the action to the Eastern District of California for further proceedings. (*Id.*) Plaintiff Christina Lovato, the Chapter 7 bankruptcy trustee, responded (ECF No. 11) and LBA replied (ECF No. 12.) As explained below, the Court will deny LBA’s motion to withdraw reference. Accordingly, the Court finds the request to transfer is moot, as that question is properly before the bankruptcy court.

II. BACKGROUND

The following facts are adapted from Lovato’s response brief. Between 2012 and 2018, Jeff Carpoft perpetrated a billion-dollar Ponzi scheme through Double Jump and other companies. (ECF No. 11 at 2.) The scheme offered investors the opportunity to “buy” mobile solar generators (“MSGs”) in exchange for an eight- or nine-figure

1 investment. (*Id.* at 3.) Carpoff siphoned funds from the debtor companies for his personal
2 benefit. (*Id.*)

3 Following a law enforcement raid in December 2018, Double Jump and the other
4 debtor companies filed voluntary Chapter 11 petitions for bankruptcy in this District. (*Id.*)
5 In March 2019, the bankruptcy court converted the Chapter 11 petitions to Chapter 7
6 petitions and appointed Lovato as the Trustee. (*Id.*)

7 Lovato filed an adversary action (“Adversary”) against LBA on January 22, 2021,
8 in the bankruptcy court. (ECF No. 1-1 at 2.) In the Adversary, Lovato asserted a fraudulent
9 conveyance claim against LBA under sections 544 and 550 of the Bankruptcy Code. (*Id.*)
10 LBA answered the complaint and moved to withdraw the reference on March 22, 2021.
11 (*Id.* at 3; ECF No. 1-2.) This action commenced in this Court the following day with LBA’s
12 Motion. (ECF No. 1.) At the time LBA moved to withdraw reference of the Adversary,
13 Lovato had filed 41 distinct adversary proceedings before the bankruptcy court. (ECF No.
14 11 at 4.) Lovato contends that fraudulent conveyance is an issue in nearly all of those
15 adversaries. (*Id.*) Lovato further asserts that she contemplates bringing further
16 adversaries, as deadlines have been extended and certain claims are subject to tolling
17 agreements. (*Id.*)

18 **III. DISCUSSION**

19 LBA argues the Court should withdraw reference of the Adversary because (1) the
20 bankruptcy court cannot finally adjudicate the fraudulent conveyance claims as a
21 constitutional matter and (2) withdrawal would serve prudential interests such as judicial
22 economy, preservation of resources, and expediency. (ECF No. 1 at 2-5.) Lovato opposes
23 the Motion, arguing that those interests are best served by waiting until the Adversary is
24 trial ready before withdrawing the reference. (ECF No. 11 at 5-8.) The Court agrees with
25 Lovato and will therefore deny the Motion.

26 **A. Legal Standard**

27 District courts have jurisdiction over matters that arise under title 11. See 28 U.S.C.
28 § 1334. However, district courts “may provide that any or all cases under title 11 and any

1 or all proceedings arising under title 11 or arising in or related to a case under title 11
 2 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). A
 3 bankruptcy court is authorized by statute to "hear and determine all cases under title 11
 4 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and
 5 may enter appropriate orders and judgments" subject to appellate review by the district
 6 court. 28 U.S.C. § 157(b)(1). A bankruptcy court's statutory authority to enter judgment in
 7 a particular proceeding depends on whether that proceeding is a "core proceeding[]"
 8 under 28 U.S.C. § 157(b)(1). "Put simply: If a matter is core, the statute empowers the
 9 bankruptcy judge to enter final judgment on the claim, subject to appellate review by the
 10 district court." *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 34 (2014).

11 "If a matter is non-core, and the parties have not consented to final adjudication by
 12 the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions
 13 of law. Then the district court must review the proceeding *de novo* and enter final
 14 judgment." *Id.* at 34; *see also* 28 U.S.C. § 157(c). Instead, in a non-core proceeding, the
 15 "bankruptcy judge shall submit proposed findings of fact and conclusions of law to the
 16 district court, and any final order or judgment shall be entered by the district judge after
 17 considering the bankruptcy judge's proposed findings and conclusions and after
 18 reviewing *de novo* those matters to which any party has timely and specifically objected."
 19 28 U.S.C. § 157(c)(1).

20 However, certain claims which are statutorily core may not be finally adjudicated
 21 by a bankruptcy court without consent of the parties due to constitutional constraints. See
 22 *Stern v. Marshall*, 564 U.S. 462, 502-03 (2011). In *Stern*, the Supreme Court held that
 23 bankruptcy courts cannot make a final judgment on a cause of action traditionally within
 24 the judicial power of an Article III court. *See id.* The Court reasoned that if a bankruptcy
 25 court were to be assigned a matter traditionally within the judicial power of an Article III
 26 court, this delegation would circumvent the protections provided by Article III, which
 27 ensure that parties have access to an independent judiciary. *See id.*

28 ///

1 But a *Stern* claim—a core claim which may not be finally adjudicated by a
 2 bankruptcy court without consent—need not be heard in the first instance by a district
 3 court. See *Exec. Benefits Ins. Agency*, 573 U.S. at 36 (“The statute permits *Stern* claims
 4 to proceed as non-core within the meaning of § 157(c).”). The Ninth Circuit clarified that
 5 “*Stern* does not affect the statutory designation of matters as core” provided that the
 6 bankruptcy court does not enter final judgment. *In re EPD Inv. Co., LLC*, 821 F.3d 1146,
 7 1151 (9th Cir. 2016) (further rejecting the adversary defendant’s argument that because
 8 he raised the right to jury trial, the bankruptcy court could not preside over the adversary
 9 until final judgment).

10 The district court retains discretion to “withdraw [referral], in whole or in part, any
 11 case or proceeding referred under this section . . . for cause shown.” 28 U.S.C. § 157(d).
 12 When determining whether to withdraw reference, “a district court should consider the
 13 efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy
 14 administration, the prevention of forum shopping, and other related factors.” *Sec. Farms*
 15 *v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d 999, 1008
 16 (9th Cir. 1999).

17 **B. Analysis**

18 LBA argues that the fraudulent conveyance claim Lovato asserts in the Adversary
 19 is statutorily core but constitutionally limited by LBA’s Seventh Amendment right to a jury
 20 trial—in other words, it is a *Stern* claim.¹ (ECF No. 1 at 3.) A common-law fraudulent
 21 conveyance claim was similarly at issue in *Executive Benefits Insurance Agency v.*
 22 *Arkison*, where the Supreme Court found that *Stern* claims need not be heard by the
 23 district court in the first instance. See 573 U.S. at 35-36. Instead, the bankruptcy court
 24 may submit proposed findings of fact and conclusions of law for *de novo* review by the
 25

26 ¹ “[P]roceedings to determine, avoid, or recover fraudulent conveyances” are
 27 statutorily core proceedings. See 28 U.S.C. § 157(b)(2)(H). Indeed, a fraudulent
 28 conveyance claim remains statutorily core even after an adversary defendant asserts a
 jury trial right. See *In re EPD Inv. Co., LLC*, 821 F.3d 1146, 1151 (9th Cir. 2016) (“*Stern*
 and its progeny simply recognize that sometimes the bankruptcy court’s statutory
 authority to decide a core matter must give way when that interest conflicts with a non-
 creditor’s constitutional right to entry of a final judgment by an Article III adjudicator.”).

1 district court, as it would for non-core claims. See *id.* at 36. Indeed, Lovato admits that
2 the bankruptcy court lacks authority to enter final judgment over the fraudulent
3 conveyance claims, but argues that the Court should therefore deny the Motion and
4 instead withdraw the reference when the Adversary is trial-ready. (*Id.* at 4-5.)

5 LBA states that other judges in this District have withdrawn reference in “similar
6 scenarios” where final adjudication by the bankruptcy court would eventually be
7 impossible. (ECF No. 12 at 4-5.) But the cases LBA cites are distinguishable and
8 unpersuasive. Reference was withdrawn in *Nelson v. XL America, Inc.*, after discovery
9 had ended and dispositive motions were prepared, and the claims at issue were
10 insurance coverage claims rather than core bankruptcy issues. See Case No. 2:16-cv-
11 00060-JAD-GWF, 2016 U.S. Dist. LEXIS 157788 (D. Nev. Nov. 14, 2016). In other cases,
12 reference was withdrawn because claims were non-core. See, e.g., *Bagley v. Beville*,
13 Case No. 2:13-cv-01119-JCM-CWH, 2013 U.S. Dist. LEXIS 100488 (D. Nev. Jul. 18,
14 2013). The difference between core and non-core claims is not merely formalistic—
15 bankruptcy judges are particularly adept at adjudicating core bankruptcy claims, and the
16 Article III court benefits from their expertise. See *In re EPD Inv. Co. LLC*, Case No. CV
17 13-05536 SJO, 2013 WL 5352953, at *6 (C.D. Cal. Sept. 24, 2013) (“Having the
18 bankruptcy court submit proposed findings of fact and conclusions of law in fraudulent
19 conveyance cases ‘promotes judicial economy and efficiency by making use of the
20 bankruptcy court’s unique knowledge of Title 11 and familiarity with the actions before
21 them.’” (quoting *In re Heathcentral.com*, 504 F.3d 775, 787-88 (9th Cir. 2007))). While there
22 may ultimately be some duplication of efforts by leaving the reference in place until the
23 Adversary is ready for final adjudication, there are also considerable benefits for the fair
24 administration of the Adversary for core matters to be handled in the bankruptcy court.

25 The circumstances of this case likewise counsel leaving the Adversary referred.
26 As Lovato states—which LBA does not deny—several similar adversaries are already
27 proceeding in the same bankruptcy proceedings. (ECF Nos. 11 at 4.) The Court is
28 unpersuaded by LBA argument that other adversaries have no bearing this Adversary’s

1 adjudication. (ECF No. 12 at 2.) Lovato argues that the adversaries she has filed relate
 2 to a Ponzi scheme, and that she seeks to avoid and recover fraudulent conveyances in
 3 almost all of the proceedings. (ECF No. 11 at 4.) The Court agrees that there may be
 4 overlapping legal and factual issues between this Adversary and other matters
 5 proceeding before the bankruptcy court. At this stage in the litigation, judicial economy
 6 favors leaving the Adversary referred.

7 The other factors courts consider when contemplating withdrawing a reference are
 8 either neutral or also favor referral. As explained above, the existence of related
 9 adversaries means both the uniformity of bankruptcy administration and the centralization
 10 of disputes weigh in favor of keeping the Adversary before the bankruptcy court. The
 11 Court is unpersuaded that Lovato is forum-shopping by opposing withdrawal of the
 12 reference, as the Adversary was initiated in the bankruptcy court. Lovato does not
 13 contend that LBA is forum-shopping, which the Court accepts, and finds this factor is
 14 neutral. (ECF No. 11 at 7.)

15 Ultimately, the Court agrees with Lovato that withdrawal of the reference is
 16 inappropriate at this stage. The Court will therefore deny the Motion without prejudice and
 17 will permit LBA to seek withdrawal when the Adversary is ready for dispositive
 18 adjudication or final judgment. Because reference will not be immediately withdrawn, the
 19 Court agrees with Lovato that the question of transfer is properly before the bankruptcy
 20 judge. The Court will therefore deny LBA's motion to transfer the Adversary to the Eastern
 21 District of California as moot.²

22 **IV. CONCLUSION**

23 The Court notes that the parties made several arguments and cited to several
 24 cases not discussed above. The Court has reviewed these arguments and cases and
 25 determines that they do not warrant discussion as they do not affect the outcome of the
 26 issues before the Court.

27

28 ²See, e.g., *In re The Mortg. Store*, 464 B.R. 421, 424 n.3 (D. Haw. 2011) (finding
 a motion to transfer moot after denying a motion to withdraw reference).

1 It is therefore ordered that Defendant's motion to withdraw reference (ECF No. 1)
2 is denied without prejudice. The Court further finds that Defendant's request for transfer
3 is moot.

4 DATED THIS 9th Day of December 2021.

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7 MIRANDA M. DU
8 CHIEF UNITED STATES DISTRICT JUDGE
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re
DOUBLE JUMP, INC.
Debtor,

Lead Case No. BK-19-50102-gs
(Chapter 7)

Substantively Consolidated with:

19-50130-gs DC Solar Solutions, Inc.
19-50131-gs DC Solar Distribution, Inc.
19-50135-gs DC Solar Freedom, Inc.

- X Affects DC Solar Solutions, Inc.
- X Affects DC Solar Distributions, Inc.
- X Affects DC Solar Freedom, Inc.
- X Affects Double Jump, Inc.

CHRISTINA W. LOVATO,
Plaintiff
v.
NIXON PEABODY LLP,
Defendant.

Adversary Case No.: 21-05072-gs

NIXON PEABODY'S REPLY TO TRUSTEE'S OPPOSITION TO NIXON'S MOTION TO WITHDRAW REFERENCE

JURY TRIAL DEMANDED

Hearing Date: February 18, 2022
Hearing Time: 9:30 a.m.

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1 **I. INTRODUCTION**

2 The central premise of the Trustee’s opposition—that Nixon waived its right to a jury and
 3 consented to final adjudication in this Court simply because it filed a proof of claim back in
 4 2019—is wrong as a matter of law. As set forth at greater length in Nixon’s opposition to the
 5 Trustee’s motion to strike Nixon’s jury demand, Exhibit A (“MTS Opp.”), Dkt. 51, the Trustee’s
 6 state-law tort and fraudulent conveyance claims cannot be finally decided by the bankruptcy court
 7 because Nixon retains its right to a jury. Those claims may be “core” under the bankruptcy code,
 8 but the constitution requires that they be decided by an Article III court, unless Nixon has
 9 consented to proceed here. Nixon has not done so. The filing of a proof of claim cannot as a
 10 matter of law amount to consent. Consent instead turns on a litigant’s course of conduct in the
 11 adversary proceeding, and Nixon’s conduct here unambiguously reflects that it does not agree to
 12 adjudication outside of an Article III forum.

13 Once that erroneous premise is removed, the Trustee’s remaining arguments against
 14 withdrawal of the reference fall away easily. The six claims that must be decided by an Article
 15 III court predominate in every sense of the word over the two remaining claims. Concerns of
 16 judicial efficiency, cost, and delay all favor withdrawing the reference too, and favor withdrawing
 17 it now. Unlike the Trustee’s other adversary proceedings, the claims against Nixon are
 18 predominantly state law tort claims that will be decided under California law. Further
 19 underscoring the need to withdraw the reference, the Eastern District of California—an Article III
 20 court empowered to oversee this proceeding—is already familiar with the facts, the claims, and
 21 the identical underlying transactions that predominate the Trustee’s complaint.¹ As explained in
 22 Nixon’s concurrently filed motion to transfer, concentrating litigation there avoids the risk of
 23 inconsistent judgments—a risk that is more than theoretical, given the important legal questions
 24 surrounding duty, privilege, knowledge, causation, and *in pari delicto* that will be litigated in
 25 each of these actions. Each factor compels in favor of withdrawing the reference now and

27 ¹ Because this is fundamentally an Eastern District of California case, Nixon Peabody respectfully
 28 suggests that the transfer motion be decided first. The transferee court can then consider the
 motion to withdraw the reference if necessary.

1 transferring this matter.

2 **II. PROCEDURAL BACKGROUND**

3 Much of the relevant factual background is offered in Nixon's motion to withdraw the
 4 bankruptcy reference. *See Lovato v. Nixon Peabody*, No. 21-05072-GS, Dkt. 17 ("Mot.") at 2–6.
 5 At the time Nixon filed this motion, it also filed a motion to transfer the adversary proceeding, *see*
 6 *id.*, Dkt. 14, a jury demand, *see id.*, Dkt. 16, and a motion to withdraw its proof of claim in the
 7 bankruptcy proceeding, *see In re Double Jump*, No. 19-50130-GS, Dkt. 2985. The Trustee
 8 opposed all three motions and then filed a motion to strike Nixon's jury demand. *See Lovato v.*
 9 *Nixon Peabody*, Dkt. 37. Each of the Trustee's briefs repackages her mistaken argument that
 10 Nixon waived its constitutional rights to a jury trial and adjudication before an Article III court
 11 merely by filing its proof of claim in the bankruptcy proceeding back in 2019. Because that
 12 argument is incorrect, the rest of the Trustee's dependent arguments also fail.

13 **III. ARGUMENT**

14 As set forth in Nixon's motion, withdrawal is favored where claims that the bankruptcy
 15 court cannot finally decide predominate over other claims. Mot. 6–7. Courts also consider *inter*
 16 *alia* “[1] the efficient use of judicial resources, [2] delay and costs to the parties, [3] uniformity of
 17 bankruptcy administration, [4] the prevention of forum shopping, and [5] other related factors.”
 18 *Sec. Farms v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d
 19 999, 1008 (9th Cir. 1997). Here, all factors favor withdrawal.

20 **A. The Trustee's constitutionally non-core claims predominate in this Adversary
 21 Proceeding.**

22 The touchstone on a motion to withdraw the bankruptcy reference is, as the Trustee
 23 appears to concede, “whether the bankruptcy court has the constitutional authority to enter final
 24 judgment on the claim at issue.” *Lovato v. Nixon Peabody*, Dkt. 36 (“Opp.”) at 9; *see also, e.g.*,
 25 *In re Zante, Inc.*, No. 3:10-CV-00231-RCJ-RAM, 2010 WL 5477768, at *6 (D. Nev. Dec. 29,
 26 2010). Bankruptcy courts lack the authority to enter final judgment on claims designated non-
 27 core under 28 U.S.C. § 157(c), as well as those designed “core” by the statute but required by the
 28

1 Constitution to be finally decided by an Article III court—that is, *Stern* claims.² See, e.g., *In re*
 2 *USDigital, Inc.*, 461 B.R. 276, 279 (Bankr. D. Del. 2011).

3 The Trustee concedes that at least six of her eight claims are *Stern* claims.³ Indeed, she
 4 calls her state law tort claims and her fraudulent conveyance claims “statutorily core” and then
 5 admits that “statutorily core claims” must ordinarily be finally decided by an Article III court.
 6 Opp. 9–10. She nevertheless argues that the bankruptcy court can finally decide the *Stern* claims
 7 because Nixon consented to adjudication here by filing a proof of claim in 2019. Not so. As set
 8 forth at considerable length in Nixon’s concurrently filed Opposition to the Trustee’s Motion to
 9 Strike Nixon’s Jury Demand, MTS Opp. 5–9, the Trustee was correct in conceding that these six
 10 claims are *Stern* claims, but she is wrong that Nixon consented to final adjudication by the
 11 bankruptcy court. Filing a proof of claim does not and cannot, as a matter of law, constitute
 12 consent, nor does it amount to a “forfeiture” of Nixon’s right to a jury as the Trustee contends.
 13 For the Court’s convenience, Nixon attaches that opposition as Exhibit A here but also provides a
 14 summary of that analysis in its argument below. The six claims that cannot be finally decided by
 15 the bankruptcy court predominate over the two that can.

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23 ² Some courts refer to these claims as *Stern* claims, while others refer to them as constitutionally
 24 non-core. This brief adopts the term *Stern* claims for the purpose of consistency.

25 ³ The Trustee actually concedes in her opposition that her “statutorily core claims for avoidance
 26 and tort are *Stern* claims,” thus including Claim VII for avoidance in the *Stern* analysis as well.
 27 Nixon agrees that The Trustee’s state-law tort claims (Claims I–IV) and fraudulent transfer claims
 28 (V–VI) are *Stern* claims. See Nixon’s Opposition to the Trustee’s Motion to Strike the Jury
 Demand (attached as Exhibit A). Nixon does not have a basis to conclude whether the Trustee’s
 avoidance claim—as opposed to the fraudulent transfer claims underlying it—would also
 constitute a *Stern* claim.

1 **1. Six of the Trustee's eight claims must be finally decided by an Article
2 III court.**

3 **a. The state-law tort claims (Counts I–IV) at the heart of the
4 Trustee's Complaint are *Stern* claims.**

5 The Trustee is correct that her state law counterclaims are *Stern* claims.⁴ Opp. 10. In
6 *Stern*, the Supreme Court held that, even where 28 U.S.C. § 157(b) permits the Bankruptcy Court
7 to enter final judgment on a particular claim, “Article III of the Constitution [may] not.” 564 U.S.
8 at 482. Just as in *Stern*, Article III does not permit a bankruptcy court to finally decide the state
9 law counterclaims at issue here. As set forth in Nixon’s MTS Opp., the public-rights exception to
10 Article III does not apply here; the Trustee’s state-law counterclaims do not “assert[] a right of
11 recovery created by federal bankruptcy law”; and the Trustee’s claims “seek ‘to augment the
12 bankruptcy estate,’” not simply to allocate “‘a pro rata share of the bankruptcy res.’” *Id.* at 488–
13 99. Nor is bankruptcy-court adjudication permissible on the ground that adjudicating Nixon’s
14 entitlement to its proof of claim would *necessarily* resolve all the issues in the Trustee’s state law
15 tort claims. The legal and factual differences between the two are manifest. *See* MTS Opp. 7–8.
16 The Trustee’s concession on this point was thus unavoidable: it is beyond dispute that her state-
17 law counterclaims are *Stern* claims that must be finally decided by an Article III court absent
18 consent to final adjudication by the bankruptcy court.

19 **b. Nixon has not consented to final adjudication by the
20 bankruptcy court of the Trustee’s state law tort claims.**

21 Because the Trustee’s state-law counterclaims are *Stern* claims, the bankruptcy court can
22 finally decide them only if Nixon has consented. As explained in Nixon’s MTS Opp., to protect
23 Article III prerogatives, consent to final adjudication by the bankruptcy court must be “knowing[]

24 ⁴ The Trustee’s original basis for bankruptcy court jurisdiction was that the Complaint was “a
25 core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (H), and (O).” Adversary Compl., *Lovato v.*
26 *Nixon Peabody*, Dkt. 1 at ¶ 13. Nixon’s motion explained in great detail how none of the
27 Trustee’s initial justifications could transform her state-law claims into core claims. The Trustee
28 now asserts that her state-law claims are “statutorily core” under two new sections: 28 U.S.C. §§
157(b)(2)(B) and (C). Opp. at 9 & n.39. Although subsection (B) involves disallowance—and is
inapplicable—the Trustee is correct that subsection (C) statutorily “permits the bankruptcy court
to enter a final judgment on” counterclaims to a proof of claim in certain circumstances. *Stern v.*
Marshall, 564 U.S. 462, 478 (2011).

1 and voluntar[y].” *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 668 (2015). “[T]he key
 2 inquiry is whether ‘the litigant or counsel was made aware of the need for consent and the right to
 3 refuse it, and still voluntarily appeared to try the case’ before the non-Article III adjudicator.” *Id.*
 4 at 684–85 (quoting *Roell v. Withrow*, 538 U.S. 580, 590 (2003)). Applying that test, Nixon has
 5 **not** consented to final bankruptcy-court adjudication of the Trustee’s state-law tort claims. *See*
 6 MTS Opp. 5.

7 As an initial matter, notwithstanding the overwhelming emphasis that the Trustee places
 8 on it, Opp. 8–13, 15–16, Nixon’s 2019 proof of claim does not and cannot constitute consistent.
 9 *Stern* established that a proof of claim is **never fully voluntary** and therefore can **never imply**
 10 **consent** to bankruptcy-court jurisdiction. In *Stern* itself, Pierce Marshall had filed a proof of
 11 claim before the debtor, Vickie Marshall, filed her counterclaim against him, but the Court did
 12 not find that the bankruptcy court had authorization to hear Vickie’s counterclaim on that (or any)
 13 basis. 564 U.S. at 470. The Court instead explained that “Pierce did not truly consent to
 14 resolution of Vickie’s claim in the bankruptcy court proceedings” because Pierce “**had nowhere**
 15 **else to go if he wished to recover from Vickie’s estate.**” *Id.* at 493. A proof of claim, in other
 16 words, can **never** be deemed fully voluntary, because a bankrupt’s creditor has “nowhere else to
 17 go” but the bankruptcy court.⁵ Indeed, the Court later recognized in *Wellness International* that
 18 “*Stern* was premised on **nonconsent** to adjudication by the Bankruptcy Court.” 575 U.S. at 682
 19 (emphasis added). Put simply, in light of *Stern* and *Wellness International*, “a creditor does
 20 not consent to final adjudication of a debtor’s common law counterclaim merely by filing
 21 a proof of claim.” *In re FKF 3, LLC*, No. 13-CV-3601 (KMK), 2016 WL 4540842, at *10

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⁵ The Trustee is therefore wrong in baldly declaring that “Nixon chose the Bankruptcy Court as the adjudicator and factfinder for the propriety of the Nixon-DC Solar attorney-client relationship and Nixon’s legal services.” Opp. 13. Nixon “had nowhere else to go if he wished to recover from [DC Solar’s] estate.” 564 U.S. at 493.

(S.D.N.Y. Aug. 30, 2016).⁶ Nixon has therefore not consented here. The Trustee has not cited a single case striking a jury demand on a *Stern* claim where the only alleged basis for consent was submission of a proof of claim. See MTS Opp. 10–11.

Under the correct standard, it is abundantly clear that Nixon has not consented to final adjudication of the Trustee’s *Stern* claim in bankruptcy court. *See id.* Absent express consent (which no one argues occurred here), courts look to a litigant’s course of conduct ***in the adversary proceeding*** to ascertain implied consent. *Stern*, 564 U.S. at 462 *In re FKF*, 2016 WL 4540842, at *10. Since the filing of this adversary proceeding, Nixon has consistently stated that it does ***not*** consent to final adjudication in bankruptcy court. Nixon highlighted its lack of consent in its first stipulation to extend time to respond, *see* Dkt. 10; its motion to transfer, Dkt. 14; the instant motion to withdraw the bankruptcy reference, Mot., Dkt. 17; and its jury demand, Dkt. 16. As catalogued in the MTS Opp., Nixon’s conduct here is not in any way comparable to that which was at issue in prior cases in which courts have found consent. *See* MTS Opp. 11 nn.4–5 (collecting cases).

c. The Trustee's fraudulent conveyance claims must also be decided by an Article III court.

As explained in greater detail in the MTS Opp., *id.* at 17–19, the Trustee’s fraudulent conveyance claims are *Stern* claims too—as she concedes. Opp. 10; *see also In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 562 (9th Cir. 2012), *aff’d sub nom. Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014).⁷ Just as with the Trustee’s state law tort claims, Nixon has not consented to final adjudication of the fraudulent conveyance claims in bankruptcy court. *See*

⁶ As explained in Nixon’s MTS Opp. (at 11 n.4), the Trustee’s reliance on *In re EPD Inv. Co., LLC*, 821 F.3d 1146 (9th Cir. 2016) is unavailing. That decision’s footnote regarding consent was not necessary to the court’s decision—the holding was that the bankruptcy court’s authority to finally decide the claims before it was irrelevant to the motion to compel arbitration at issue on appeal—and is therefore non-binding dicta. *Id.* at 1150–51 & n.2; see also *Cf. United States v. Anekwu*, 695 F.3d 967, 975 (9th Cir. 2012).

⁷ See also *In re Rhodes Companies, LLC*, No. 2:12-CV-01272-MMD, 2012 WL 5456084, at *4 (D. Nev. Nov. 7, 2012) (“[A] court deciding a fraudulent conveyance action exercises its Article III judicial power, and the Seventh Amendment entitles a litigant to a jury trial on such claims.”).

1 MTS Opp. 17–19. The same standard of consent that applies to the state-law claims applies here,
 2 *In re Bellingham*, 702 F.3d at 568, and as explained above, *supra* Section III.A.1, and in the MTS
 3 Opp. 17–19, there is no basis to conclude that Nixon provided its knowing and voluntary consent.
 4 The fraudulent conveyance claims also must be decided by an Article III court.⁸

5 **2. The Trustee’s two remaining claims do not predominate.**

6 The Trustee does not dispute that the remaining claims do not predominate here. And
 7 practically speaking, the Trustee’s disallowance claim is already moot: Nixon has moved to
 8 withdraw its proof of claim with prejudice and will not pursue payment on it regardless of how
 9 that motion is resolved. The Trustee also fails to address the limited scope of her avoidance
 10 claim—DC Solar did not directly pay for most of these services and thus cannot recover for
 11 payments it did not make. *See In re Summers*, 320 B.R. 630, 648–49 (Bankr. E.D. Mich. 2005)
 12 (holding that no claim exists under 11 U.S.C. § 548 for fraudulent transfer of assets that never
 13 belonged to the debtor).

14 Moreover, as explained above, the disallowance and avoidance claims do not cover the
 15 same scope—in breadth or depth—as the Trustee’s state-law tort claims. To resolve the state-law
 16 claims, the Court will need to conduct a completely different analysis, one spanning a much
 17 longer time period (over eight years) with entirely different causation and damages issues. The
 18 six constitutionally non-core claims predominate and must be tried to an Article III court, which
 19 “weighs very heavily in favor of withdrawal.” *In re Zante, Inc.*, 2010 WL 5477768, at *6.

20 **B. Each remaining factor concerning withdrawal of the bankruptcy reference
 21 favors granting Nixon Peabody’s motion.**

22 Nixon argued in its motion to withdraw that judicial efficiency, cost and delay,
 23 administration of the bankruptcy estate, and forum-shopping concerns all counsel in favor of
 24 withdrawing the bankruptcy reference now. *See Mot.* 10–15. As a preliminary matter, the
 25 Trustee’s arguments to the contrary, Opp. 13–17, all hinge upon the Trustee’s erroneous
 26 argument that the bankruptcy court has the authority to finally decide all of the Trustee’s claims.

27 ⁸ Nixon’s concurrently filed Reply to its Motion to Withdraw the Proof of Claim provides further
 28 detail on why the Court should allow withdrawal.

1 If the Court disagrees with that premise and finds that the state law tort claims and fraudulent
 2 conveyance claims must be decided in an Article III forum, the Trustee's remaining arguments
 3 are a dead letter.

4 *First*, judicial efficiency, cost, and delay all favor withdrawal. As Nixon argued in its
 5 motion, multiple courts have recognized that it is a poor use of resources for both the bankruptcy
 6 court and the district court to consider each dispositive motion anew, especially where, as here, an
 7 Article III court will ultimately have to preside over the eventual trial. *See Mot.* 10–11. The
 8 Trustee has in fact acknowledged in her opposition to Nixon's motion to withdraw its proof of
 9 claim that “*de novo* review would cause the Trustee to incur additional costs and delay.” Dkt.
 10 3108 at 15, *In re Double Jump, Inc.*, No. BK-19-50102-GS.

11 Other than repeating the incorrect argument that the bankruptcy court has “exclusive
 12 jurisdiction” over even Nixon's *Stern* claims, the Trustee's only argument on this factor is that
 13 “Nixon dismisses the time and resources invested by this Bankruptcy Court in these Bankruptcy
 14 Cases.” Opp. 14. That is false. Nixon appreciates the enormity of the task that is presiding over
 15 a bankruptcy of this scope. But this adversary case has just been filed and the bankruptcy court
 16 has not yet had to familiarize itself with the California state-law claims and defenses at issue or
 17 with the nine-year factual record that underlies them. Nixon has no doubt that the bankruptcy
 18 court is familiar with the DC Solar entities and their bankruptcy petitions, but this proceeding
 19 involves the pre-petition conduct of Nixon and numerous other third parties involved in over 30
 20 transactions, which the Bankruptcy Court has yet to address in depth.

21 As for the other adversary proceedings, which the Trustee references as already within the
 22 bankruptcy court's knowledge, *see id.* at 14, a review of those actions shows that they are
 23 fundamentally different from this one. None of the Trustee's remaining adversary proceedings
 24 contain state-law tort claims that mirror the depth and the breadth of its claims against Nixon.
 25 Mot. 10–11. Only two of the other 40+ proceedings have any tort-based claims at all, and both
 26 proceedings differ significantly from this one, in which a nine-year relationship and 30
 27
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1 transactions are at issue.⁹ The Trustee misleadingly suggests that each of the 40+ proceedings at
 2 issue involves fraudulent transfer claims similar to those at issue here. *See* Opp. 14. But the
 3 Trustee's fraudulent transfer claims against Nixon are brought under 11 U.S.C. § 548(a)(1)(B),
 4 while *every* other fraudulent transfer claim arises under 11 U.S.C. § 548(a)(1)(A).¹⁰ This
 5 difference is significant. Claims under subsection (A) focus on DC Solar's conduct and the
 6 applicability of the Ponzi scheme exception, both of which are surely within the bankruptcy
 7 court's knowledge and expertise. The claims against Nixon under subsection (B), however,
 8 requires the Court to analyze *Nixon Peabody's* conduct and determine whether DC Solar received
 9 "less than a reasonably equivalent value in exchange" for what DC Solar paid Nixon. 11 U.S.C.
 10 § 548(a)(1)(B)(i). These issues have not been raised before the Bankruptcy Court and will likely
 11 not be raised on any other occasion.

12 Indeed, as set forth in Nixon's transfer motion, the best use of resources would be for the
 13 case to proceed in the Eastern District of California, where two strikingly similar cases involving
 14 the knowledge and participation of third parties—including Nixon—are already pending. *See*
 15 Nixon's Mot. to Transfer, *Lovato v. Nixon Peabody*, Dkt. 14 at 14. The Eastern District is already
 16 considering the specific issues in *this* proceeding, which will also require coordinating discovery
 17 with multiple third parties.

18 **Second**, withdrawal will not harm the administration of the bankruptcy estate. *See* Opp.
 19 14–15. The Trustee's primary argument here, again revolves around the other adversary
 20 proceedings she has brought. *See id.* As just explained, those actions are fundamentally different
 21 from this one. She also argues that her "avoidance claims would not exist absent the
 22 bankruptcy," *id.* at 15, but fails to address how district-court adjudication would somehow harm

23
 24 ⁹ The individualized, tort-based claims against Nixon are unlike the two other proceedings the
 25 Trustee cites as having tort-based claims. Adversary Case No. 21-5040-gs, which alleges a
 26 conversion claim, is about a post-petition transfer by the Carpoffs. Adversary Case No. 21-5031-
 27 gs is against Paulette and Jeff Carpoff's children, who were employees of DC Solar.

28 ¹⁰ Subsection A primarily looks to the conduct of the debtor and whether the debtor had "actual
 29 intent to hinder, delay, or defraud any entity." 11 U.S.C. § 548(a)(1)(A). Subsection B requires
 30 the Court to determine whether DC Solar received "less than a reasonably equivalent value in
 31 exchange" for what DC Solar paid Nixon. 11 U.S.C. § 548(a)(1)(B)(i).

1 administration of the DC Solar estate. To the contrary, numerous cases after *Stern* have required
 2 district courts to finally adjudicate fraudulent transfer claims that undergird an avoidance action;
 3 the Trustee does cite to a single case where that adjudication harmed the administration of the
 4 estate. Ultimately, the Trustee also fails to address that any slight disruption to the
 5 administration of a bankruptcy estate “is outweighed by the efficiency that will result in
 6 withdrawing the Trustee’s non-core claims.” *Everett v. Art Brand Studios, LLC*, 556 B.R. 437,
 7 446 (N.D. Cal. 2016).¹¹

8 **Third**, Nixon is not forum-shopping. *See* Opp. 15. As explained above, Nixon had
 9 nowhere else to go to file its proof of claim. And now that the Trustee cynically has seized upon
 10 that submission to attempt to deny Nixon its Seventh Amendment jury-trial right, Nixon has
 11 walked away from its proof of claim altogether. Nixon does not ultimately wish to be in **any**
 12 forum, but since it has been sued, Nixon wishes only (1) to preserve the rights guaranteed it by
 13 the Constitution and (2) to maximize efficiency and minimize costs. Those principles lead
 14 inexorably to the district court, particularly in the Eastern District of California. Taking the steps
 15 to accomplish those goals—goals which serve the judicial system too—is no more **forum**
 16 **shopping** than is any action declining magistrate jurisdiction, seeking to transfer a case, or
 17 moving to withdraw a reference. And the Trustee’s suggestion that “Nixon now strategically
 18 prefers to have this matter adjudicated elsewhere,” in apparent contrast to what Nixon
 19 “prefer[red]” when it filed its proof of claim, Opp. 15, makes no sense. Not only did Nixon have
 20 no choice where to file that proof of claim, but this action had not yet been filed and would not be
 21 filed for another 30 months. The insinuation that Nixon initially **preferred** to litigate this
 22 adversary proceeding here and later changed its mind belies reality. The Trustee’s forum-
 23 shopping arguments should be disregarded.

24

25 ¹¹ The Trustee does not address the possibility of severance. When “[u]niform administration of
 26 the bankruptcy estate is the sole factor that favors not withdrawing the reference,” courts have
 27 severed non-core claims and allowed only core claims to proceed before the Bankruptcy Court.
In re Rosales, No. 13-CV-01316-LHK, 2013 WL 5962007, at *7, (N.D. Cal. Nov. 7, 2013).
 28 Should the Court have concerns about administration of the estate, severance provides a feasible
 and practical alternative.

1 C. The Court should withdraw the reference now.

2 Because each factor counsels in favor of withdrawing the bankruptcy reference, the only
 3 remaining question is whether the Court should withdraw the reference now or later. The
 4 interests of judicial efficiency, avoiding unnecessary cost and delay, and fairness all weigh
 5 heavily in favor of withdrawing the reference now.

6 The Trustee's argument that the Court should "withdraw the reference when the matter is
 7 trial-ready, not in its earlier stages" ignores the most analogous cases. Opp. at 16. Where the
 8 claims that predominate must be decided by an Article III court, courts within this district have
 9 repeatedly concluded that withdrawal at an earlier stage is preferable. *See Shengdatech*
 10 *Liquidating Trust v. Hansen, Barnett, & Maxwell, P.C.*, No. 3:13-CV-00563-RCJ, 2013 WL
 11 6408518, at *2–3 (D. Nev. Nov. 26, 2013) (withdrawing reference where non-core issues
 12 predominated and adjudication would likely not impact the bankruptcy administration); *see also*
 13 *Off. Comm.. of Unsecured Creditors v. Marini (In re Windspire Energy, Inc.)*, No. 3:13-cv-10-
 14 RCJ-WGC, 2013 U.S. Dist. LEXIS 46727, at *2–3 (D. Nev. April 1, 2013) (withdrawing
 15 reference in a case involving breach of fiduciary duty and fraudulent transfer because of judicial
 16 economy and on recommendation of the bankruptcy judge); *Nelson v. XL Am., Inc. (In re Ameri-*
 17 *Dream Realty, LLC*), No. 2:16-CV-00060-JAD-GWF, 2016 U.S. Dist. LEXIS 157788 (D. Nev.
 18 Nov. 14, 2016) (withdrawing reference to avoid duplicating efforts); *see also* Ex. F (*USACM*
 19 *Liquidating Trust v. Compass USA SPE, LLC (In re USA Com. Mortg. Co.)*, No. 2:14-cv-00455-
 20 RCJ-PAL, U.S. Dist. LEXIS 72663 (D. Nev. May 28, 2014), Dkt. No. 4 (withdrawing reference
 21 on recommendation of the bankruptcy judge because the parties would be litigating the same
 22 issues related to another action pending before the District Court)).

23 As Nixon noted in its Motion—and the Trustee does not refute—cases denying early
 24 withdrawal of the bankruptcy reference are easily distinguishable from this adversary proceeding.
 25 *See* Mot. at 12–13. *First*, many of those cases involve only fraudulent transfer claims, which may
 26 "routinely arise in the context of bankruptcy." *Rosenberg v. Harvey A. Bookstein*, 479 B.R. 584,
 27 590 (D. Nev. 2012). *Second*, cases denying early withdrawal often have virtually identical
 28 adversary complaints already pending before the bankruptcy court for the *same* underlying

1 fraudulent transfer claims. ***Third***, cases denying early withdrawal typically conclude that the
 2 bankruptcy court is most familiar with the parties and issues. Here, the Trustee’s adversary
 3 complaint against Nixon Peabody is unique in its individualized, tort-based claims and
 4 allegations, which comprise almost the entirety of the Complaint. *See supra* Section III.A. And
 5 as Nixon’s motion to transfer explains, the Eastern District of California—not the bankruptcy
 6 court—is the court most familiar with the parties, the claims, and the underlying pre-petition
 7 conduct at issue. The very same claims and defenses will be litigated before that court, which
 8 already has familiarity with many of the criminal and civil cases related to DC Solar’s downfall.

9 Although the Trustee argues that the order in *LBA* is “instructive” because it weighs “in
 10 favor of denying withdrawal of reference until the . . . adversary is trial ready,” *LBA* is
 11 distinguishable for the same reasons and instead supports withdrawing ***this*** reference
 12 immediately. Opp. at 4. The Trustee conceded in *LBA*—as she does here—that the adversary
 13 complaint involved *Stern* claims. *See LBA* Order at 5 (“Lovato admits that the bankruptcy court
 14 lacks authority to enter final judgment over the fraudulent conveyance claims.”). The Court
 15 denied early withdrawal because the Trustee seeks to “avoid and recover fraudulent conveyances
 16 in almost all of the [adversary] proceedings,” and “there may be overlapping legal and factual
 17 issues between this Adversary and other matters proceeding before the bankruptcy court.” *Id.* at
 18 6. As explained above, however, the Trustee’s fraudulent transfer claims against Nixon are
 19 significantly different—factually and legally—from any of the Trustee’s other adversary
 20 proceeding. None of the same elements or defenses will likely apply. And what the Trustee
 21 ignores is that, unlike this proceeding, *LBA* does not involve predominant state-law tort claims
 22 alleging hundreds of millions of dollars in damages entirely unrelated to the bankruptcy court’s
 23 core powers. *LBA*’s analysis also supports early withdrawal of this adversary proceeding.

24 By not withdrawing the reference now, the Court risks upending each of the interests at
 25 stake in both this motion and in Nixon’s motion to transfer. Early withdrawal is the only way to
 26 further the interests of justice, ensure judicial efficiency, promote the convenience of the parties,
 27 and avoid unnecessary cost and delay.

28 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, this Court should withdraw the bankruptcy reference now.

3 Dated: February 4, 2022

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4 By: s/Elliot R. Peters

5 ELLIOT R. PETERS

6 ERIC H. MACMICHAEL

7 Dated: February 4, 2022

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EXHIBIT A

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re
DOUBLE JUMP, INC.
Debtor,

Lead Case No. BK-19-50102-gs
(Chapter 7)

Substantively Consolidated with:

19-50130-gs DC Solar Solutions, Inc.
19-50131-gs DC Solar Distribution, Inc.
19-50135-gs DC Solar Freedom, Inc.

- X Affects DC Solar Solutions, Inc.
- X Affects DC Solar Distributions, Inc.
- X Affects DC Solar Freedom, Inc.
- X Affects Double Jump, Inc.

CHRISTINA W. LOVATO,
Plaintiff

v.
NIXON PEABODY LLP
Defendant

Adversary Case No.: 21-05072-gs

NIXON PEABODY'S OPPOSITION TO MOTION TO STRIKE JURY TRIAL DEMAND

JURY TRIAL DEMANDED

Hearing Date: February 18, 2022
Hearing Time: 9:30 a.m.

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1 **I. INTRODUCTION**

2 The Trustee advances the stunning proposition that when Defendant Nixon Peabody LLP
 3 (“Nixon”) filed a proof of claim for \$110,000 in unpaid legal fees in early 2019, Nixon thereby
 4 knowingly and voluntarily waived its Seventh Amendment right to a jury trial on the Trustee’s
 5 state-law tort counterclaims, which were not filed until ***30 months later*** and which dwarf Nixon’s
 6 claim by more than three orders of magnitude, seeking ***hundreds of millions of dollars*** in
 7 damages. The Trustee is incorrect.

8 The Trustee does not dispute that, had she filed her legal-malpractice and breach-of-
 9 fiduciary-duty claims in an Article III court, Nixon would have a Seventh Amendment jury-trial
 10 right. Nor does she dispute that her claims are *Stern* claims—claims designated as “core” by
 11 statute but required by the Constitution to be decided by an Article III court, where Nixon would
 12 have the right to a jury. Instead, she argues that Nixon should be deprived of its Seventh
 13 Amendment right in this case solely because the proof of claim that Nixon filed in 2019
 14 amounted to consent to final adjudication of her *Stern* claims by the bankruptcy court. That’s
 15 wrong. The Trustee’s effort to deny Nixon its fundamental right to a jury trial runs headlong into
 16 the Supreme Court’s holdings in *Stern v. Marshall*, 564 U.S. 462 (2011), and *Wellness*
 17 *International Network, Ltd. v. Sharif*, 575 U.S. 665 (2015)—two cases that, tellingly, are hardly
 18 addressed in the Trustee’s motion. Read together, those decisions hold that state tort-law
 19 counterclaims implicating broader issues than those raised by a proof of claim must be heard by
 20 an Article III court, absent the defendant’s knowing and voluntary consent. And as a matter of
 21 law, that knowing and voluntary consent cannot be implied from the filing of a proof of claim,
 22 because *Stern* held (and *Wellness International* reaffirmed) that proofs of claim ***never*** are fully
 23 voluntary. The reason is simple: A creditor has “nowhere else to go” beside the bankruptcy court
 24 if it hopes to recover anything against the debtor’s estate. 564 U.S. at 493.

25 Here it is plain both that the factual and legal issues raised by the Trustee’s counterclaims
 26 are vastly broader in scope than those implicated by Nixon’s proof of claim and that Nixon has
 27 never consented to adjudicating those counterclaims outside of an Article III tribunal. Nixon thus
 28 retains its Seventh Amendment right. The cases that the Trustee relies on—nearly all of which

1 pre-date *Stern*—do not indicate otherwise. In fact, the Trustee has not cited a single case in which
 2 a court struck a jury demand on a *Stern* claim on the ground that filing a proof of claim, without
 3 more, amounted to consent. At any rate, even if Nixon’s right to a jury trial were deemed to be a
 4 close question—which it isn’t—binding precedent requires that any doubt be resolved in favor of
 5 preserving Nixon’s constitutional rights. This is doubly so now that Nixon has sought to
 6 withdraw its proof of claim with prejudice.

7 The same result should follow for the Trustee’s fraudulent-conveyance claims. Just like
 8 state-law tort claims, fraudulent-conveyance claims have traditionally carried a Seventh
 9 Amendment jury-trial right. The fraudulent-conveyance claims in this case are not so bound up in
 10 the claims-allowance process that Article III permits them to be finally decided in bankruptcy
 11 court; nor has Nixon consented to that result. It thus follows that these claims must be tried to a
 12 jury in district court.

13 The Trustee’s motion to strike Nixon’s jury demand should be denied.

14 **II. BACKGROUND**

15 The facts giving rise to this action are set forth at greater length elsewhere, including
 16 Nixon’s recently filed motion to dismiss. Dkt. 43. Relevant here, DC Solar was a Ponzi scheme
 17 launched by Jeff and Paulette Carpooff, who are both now convicted felons. *See Adversary*
 18 *Complaint*, Dkt. 1 ¶¶ 1–2, 10, 16, 48 (“*Compl.*”). During the operation of their Ponzi scheme
 19 from approximately 2010 through 2018, DC Solar retained Nixon to provide legal opinion letters
 20 explaining the federal tax consequences of investing in DC Solar’s funds. *Id.* ¶¶ 50, 106. The
 21 opinion letters were clearly and explicitly premised on management-provided factual assumptions
 22 that later turned out to be false.

23 DC Solar’s scheme collapsed in December 2018 when federal law enforcement raided the
 24 company’s headquarters in the Eastern District of California. *Id.* ¶ 39. Shortly after that raid, the
 25 various DC Solar entities began filing for bankruptcy in the District of Nevada. *Id.* ¶ 42. Those
 26 proceedings have been consolidated and converted from Chapter 11 to Chapter 7. *See id.* ¶ 43; *In*
 27 *re Double Jump, Inc.*, No. 19-50102-gs, Dkts. 390, 438. In March 2019, Nixon filed a proof of
 28 claim arising out of three unpaid DC Solar invoices. *See Claim 34-1, In re DC Solar Solutions,*

1 *Inc.*, No BK-19-50130-GS (“*In re Double Jump, Inc.*”). Those invoices, two dated January 14,
 2 2019 and another from February 13, 2019, totaled \$111,223.95—a relatively small percentage of
 3 the approximately \$3 million Nixon was paid over the course of its nine-year representation of
 4 DC Solar. Compl. ¶ 231.

5 On October 25, 2021, the Chapter 7 Trustee filed this Adversary Complaint against Nixon
 6 alleging five claims under California law, including malpractice (Count I), breach of fiduciary
 7 duty (Count II), aiding and abetting (Count III), and conspiracy (Count IV), as well as fraudulent
 8 transfer under 11 U.S.C. § 544 and California state law (Count V); fraudulent transfer under 11
 9 U.S.C. §§ 548(a)(1)(B) (Count VI); avoidance under 11 U.S.C. § 550 (Count VII); and
 10 disallowance (Count VIII). *See generally* Compl. ¶¶ 251-328. The Trustee alleges that DC Solar’s
 11 bankruptcy estate should be able to recover “hundreds of millions” of dollars from Nixon on the
 12 theory that Nixon failed to investigate and prevent DC Solar’s criminal misconduct. Nixon has
 13 moved to dismiss the complaint as barred by the *in pari delicto* doctrine, which dictates that a
 14 participant in an act of intentional fraud—or a bankruptcy trustee standing in that participant’s
 15 shoes—cannot recover damages from another alleged participant. *See* Dkt. 43.

16 Since the filing of this adversary proceeding, Nixon has consistently stated that it does **not**
 17 consent to final adjudication in bankruptcy court. Nixon’s first submission in this adversary
 18 proceeding was a simple stipulation to extend its time to respond to the complaint. *See* Dkt. 10.
 19 Nixon stated there that “by entering into this Stipulation, the Defendant does not intend to consent
 20 to jurisdiction or venue in this court, or to waive any right to contest jurisdiction or venue, and the
 21 Parties expressly reserve the right to move this court for an appropriate order as to jurisdiction or
 22 venue.” *Id.* at 2. Nixon then filed a motion to transfer this case to the Eastern District of
 23 California, where it is already being sued for its work relating to DC Solar. *See* Dkt. 14. In that
 24 submission, too, Nixon stated that it “does not consent to the entry of final orders or judgments by
 25 the bankruptcy judge on any and all claims on which the bankruptcy judge cannot enter final
 26 orders or judgments consistent with Article III of the United States Constitution. Nixon Peabody
 27 demands a jury trial on all issues so triable in the Adversary Proceeding” *Id.* at 4. Nixon said
 28 the same in its contemporaneously filed motion to withdraw the bankruptcy reference. Dkt. 17 at

1 4-5. Nixon also filed a jury demand (compliant with Local Rule 9015) that same day. Dkt. 16.

2 And Nixon also has moved to withdraw its proof of claim. Nixon thus relinquished any
 3 claim to its unpaid fees, recognizing that (1) it no longer expects ever to recover those fees; (2) it
 4 would therefore waste the parties' and the Court's time and resources to litigate over fees; and (3)
 5 the Trustee has cynically seized upon Nixon's filing of its relatively modest claim to argue that
 6 Nixon knowingly and voluntarily waived its right to a jury trial on the vastly larger counterclaims
 7 that the Trustee filed 30 months later—no matter how tangential those counterclaims are to
 8 Nixon's unpaid-fees claim. *See* Dkt. 2985, *In re Double Jump*.

9 Nevertheless, two months after Nixon irrevocably relinquished any right to seek payment
 10 on its proof of claim, the Trustee filed the present motion to strike Nixon's jury demand, relying
 11 entirely on the proof of claim to establish Nixon's purported "consent" to bankruptcy-court
 12 jurisdiction.

13 **III. ARGUMENT**

14 **A. The Trustee's state-law counterclaims must be decided by a jury in the
 15 District Court absent Nixon's consent, which Nixon has not provided.**

16 The Seventh Amendment to the United States Constitution provides that "[i]n Suits at
 17 common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury
 18 shall be preserved . . ." U.S. Const. amend. VII. "The Seventh Amendment thus secures the right
 19 to a jury trial for suits in which *legal* rights are to be ascertained and determined, in
 20 contradistinction to those where equitable rights alone are recognized, and equitable remedies are
 21 administered." *Teutscher v. Woodson*, 835 F.3d 936, 942-943 (9th Cir. 2016) (cleaned up). The
 22 Trustee does not and cannot dispute that her state-law tort claims for professional malpractice and
 23 breach of fiduciary duty involve legal, not equitable, rights and thus carry with them a jury trial
 24 right.¹ Had this suit been brought in the absence of a bankruptcy, there is no question that Nixon
 25

26 ¹ Notwithstanding any equitable origins, breach-of-fiduciary duty claims like those at issue here
 27 are "legal" and trigger a jury-trial right. *See* California Civil Jury Instructions No. 4100 (defining
 28 fiduciary duty for use in California jury trials); *see also DePinto v. Provident Sec. Life Ins. Co.*,
 323 F.2d 826, 837 (9th Cir. 1963); *Okura & Co. (Am.) v. Careau Grp.*, 783 F. Supp. 482, 491
 (C.D. Cal. 1991); *Ceriale v. Superior Ct.*, 48 Cal. App. 4th 1629, 1634 (1996).

1 would have the right to a trial by jury.

2 Instead, the Trustee maintains that, through the mere filing of a proof of claim in the
 3 bankruptcy proceeding, Nixon implicitly waived its right to have a jury trial in an Article III court
 4 regarding the Trustee's counterclaims in this adversary proceeding. Not so. Nixon retains its
 5 Seventh Amendment jury trial right because the Constitution requires final adjudication by an
 6 Article III court absent the parties' knowing and voluntary consent to bankruptcy-court
 7 jurisdiction, which has not been provided here either expressly or impliedly. Far from evincing
 8 consent, Nixon has stated since its very first submission in this case that it does ***not*** consent to
 9 final adjudication by the bankruptcy court. Even if this Court were to find the question close,
 10 constitutional concerns require preserving Nixon's right to a jury trial. Nixon's request to
 11 withdraw its proof of claim in the main case bolsters its argument that consent is absent here.

12 As detailed below, the Court's analysis proceeds in two steps:

13 ***First***, the Court must decide whether the Trustee's counterclaims are so-called "*Stern*
 14 claims"—claims assigned to the bankruptcy court by statute but barred from the bankruptcy court
 15 by the constitutional scheme of separation of powers, as held in the Supreme Court's *Stern*
 16 decision. Here that inquiry is resolved by the Trustee's express admission that her counterclaims
 17 are *Stern* claims. We explain below why the law left the Trustee no choice but to concede this
 18 critical point. *See* Part III.A.1., below.

19 ***Second***, the Court must decide whether the Trustee's *Stern* claims may nevertheless be
 20 decided in bankruptcy court, without a jury, because Nixon impliedly consented to bankruptcy-
 21 court jurisdiction when it filed a proof of claim. We explain below why the filing of a proof of
 22 claim, while potentially bearing on the first (*Stern*-claim) inquiry, is completely irrelevant to this
 23 second (consent) inquiry, as a matter of law. Accordingly, the Court must reject the Trustee's
 24 contention that Nixon's filing of a proof of claim waived its constitutional right to have the
 25 Trustee's counterclaims adjudicated by a jury in an Article III court. *See* Part III.A.2., below.

26 **1. The Trustee concedes that her counterclaims are "*Stern* claims" that
 27 must be heard by an Article III court.**

28 Title 28 U.S.C. § 157(b) authorizes bankruptcy courts to "hear and determine"—that is, to

1 enter final judgment on—"all core proceedings." *See Stern*, 564 U.S. at 475-476. Section 157(b)
 2 lists 16 examples of core proceedings, one of which is "counterclaims by the estate against
 3 persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(C). But the Supreme Court held in
 4 *Stern* that, even where that provision permits the Bankruptcy Court to enter final judgment on a
 5 counterclaim, "Article III of the Constitution [may] not." 564 U.S. at 482.² The *Stern* Court
 6 recognized that "Article III is an inseparable element of the constitutional system of checks and
 7 balances that both defines the power and protects the independence of the Judicial Branch." *Id.* at
 8 482–83 (cleaned up). Article III, the Court instructed, "could neither serve its purpose in the
 9 system of checks and balances nor preserve the integrity of judicial decisionmaking if the other
 10 branches of the Federal Government could confer the Government's 'judicial Power' on entities
 11 outside Article III." *Id.* at 484. Because deciding the claims at issue in *Stern* entailed exercising
 12 the judicial power of the United States, the Supreme Court held that the bankruptcy court "lacked
 13 the constitutional authority to enter a final judgment." *Id.* at 503. The Court recognized the
 14 narrow scope of its decision, but nevertheless admonished:

15 If our decision today does not change all that much, then why the fuss? Is there
 16 really a threat to the separation of powers where Congress has conferred the
 17 judicial power outside Article III only over certain counterclaims in bankruptcy?
 18 The short but emphatic answer is yes. A statute may no more lawfully chip away
 19 at the authority of the Judicial Branch than it may eliminate it entirely. "Slight
 encroachments create new boundaries from which legions of power can seek new
 territory to capture."

20 *Stern*, 564 U.S. at 502–03 (citation omitted).

21 In sum, under *Stern*, even where § 157(b)(2)(C) purports to authorize a bankruptcy court
 22 to enter final judgment on a counterclaim, the Constitution forbids it if deciding the counterclaim
 23 entails exercising the judicial power of the United States. *Id.* at 486–88. Such claims—ones

25 ² *See also Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 28 (2014) ("In *Stern* . . . this Court
 26 held that even though bankruptcy courts are statutorily authorized to enter final judgment on a
 27 class of bankruptcy-related claims, Article III of the Constitution prohibits bankruptcy courts
 28 from finally adjudicating certain of those claims."); *Germain v. Connecticut Nat. Bank*, 988 F.2d
 1323, 1327 (2d Cir. 1993) ("Neither Congress nor the courts may deprive litigants of their
 constitutional rights simply by labeling a cause of action 'core.'").

1 designated by statute for final adjudication in the bankruptcy court but prohibited by the
 2 Constitution from proceeding in that way—have since come to be called “*Stern* claims.” *See, e.g.*,
 3 *Wellness Int’l*, 575 U.S. at 678.

4 The Trustee has conceded, as she must, that her state-law counterclaims are *Stern*
 5 claims.³ On this point, the Trustee is correct. The *Stern* court laid out four primary reasons why a
 6 non-Article III court could not decide debtor Vickie Marshall’s tortious-interference counterclaim
 7 against her stepson, Pierce Marshall: (1) the counterclaim did not fall within the “public rights
 8 exception” to Article III; (2) the trustee was not asserting a right of recovery created by federal
 9 bankruptcy law; (3) the trustee was “seek[ing] to augment the bankruptcy estate,” not simply to
 10 handle the *pro rata* distribution of assets; and (4) ruling on Pierce Marshall’s proof of claim
 11 would not “*necessarily* result in the resolution of Vickie’s counterclaim.” *Id.* at 488-499
 12 (emphasis added).

13 Here, the same reasons require Article III adjudication.

14 a. The Trustee has never argued that the public-rights exception permits her claims to be
 15 tried to an Article I court. That exception applies where a claim “can be pursued only by grace of
 16 the other branches” or “historically could have been determined exclusively by those branches.”
 17 564 U.S. at 493 (cleaned up). Here, as in *Stern*, the state-law tort claims “involve[] the most
 18 prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with
 19 broad substantive jurisdiction, on a common law cause of action, when the action neither derives
 20 from nor depends upon any agency regulatory regime.” *Id.* at 494.

21 b. Nor can the Trustee argue that she is “asserting a right of recovery created by federal
 22 bankruptcy law.” *Stern*, 564 U.S. at 498. The state-law counterclaims are “in no way derived
 23 from or dependent upon bankruptcy law”; rather, they are “state tort action[s] that exist[] without
 24 regard to any bankruptcy proceeding.” *Id.* at 499. This fact, too, indicates that Article III
 25

26 ³ *See, e.g.*, Dkt. 37 at 9 (“Mot.”) (explaining rule that “Article III to the Constitution permits
 27 bankruptcy courts to finally adjudicate *Stern* claims . . . with the parties’ consent”); *see also* Dkt.
 28 36 (Trustee Opp. to Mot. to Withdraw Reference) at 10 (“As a constitutional matter, the Trustee’s
 statutorily core claims for avoidance and tort are *Stern* claims and may be finally adjudicated by
 this Bankruptcy Court with consent.”).

1 adjudication is required.

2 c. *Stern* distinguished between “actions that seek ‘to augment the bankruptcy estate’”—
 3 which require Article III adjudication—“and those that seek ‘a pro rata share of the bankruptcy
 4 res.’” *Stern*, 564 U.S. at 499 (quoting *Granfinanciera v. Nordberg*, 492 U.S. 33, 56 (1989)). Here,
 5 the Trustee’s counterclaims fall into the first bucket. As explained above, the Trustee seeks
 6 ***hundreds of millions of dollars*** from Nixon. That is a paradigmatic example of a claim that seeks
 7 to augment the estate; indeed, the recovery that the Trustee seeks for her counterclaims is at least
 8 ***one thousand times greater*** than Nixon’s now-withdrawn proof of claim.

9 d. In *Stern*, as here, the debtor argued that final adjudication by the bankruptcy court was
 10 permissible because the counterclaim defendant filed a proof of claim in the bankruptcy
 11 proceeding. 564 U.S. at 495-96. But the Court concluded that, although there was “some overlap
 12 between Vickie’s counterclaim and Pierce’s . . . claim” against the estate, “there was never any
 13 reason to believe that the process of adjudicating Pierce’s proof of claim would necessarily
 14 resolve Vickie’s counterclaim.” *Id.* at 497. The same is true here:

- 15 • The three invoices at issue in Nixon’s proof of claim total just over \$100,000 and are
 16 dated from early 2019. The Trustee’s state-law counterclaims, in contrast, deal with over
 17 30 separate transactions, each of which was billed separately and for which Nixon had
 18 already been paid \$2.9 million by DC Solar. Compl. ¶¶ 3, 231.
- 19 • The Trustee makes scores of factual allegations in her adversary complaint that are not
 20 implicated by Nixon’s proof of claim. She alleges, for example, that Nixon had a conflict
 21 of interest dating back to October 2010, *see id.* ¶ 50; committed malpractice in connection
 22 with DC Solar’s first transaction, in late 2010 and early 2011, *id.* ¶¶ 76-82, “failed to
 23 properly document its representation of Solutions and Distribution” in 2010, also at the
 24 outset of its representation, *id.* ¶¶ 51, 55; wrote letters in 2014 and 2015 stating that some
 25 of the DC Solar investment funds were also Nixon clients, *id.* ¶ 67 & Ex. 2; and received
 26 payments from some of the DC Solar investment funds, *id.* ¶ 70. Finding whether the
 27 Trustee has proven these allegations would play no role in deciding whether Nixon is
 28 entitled to payment on its proof of claim.

- 1 • The Trustee’s state-law counterclaims also require the Court to consider whether Nixon
2 committed malpractice before March 2017, when the Trustee alleges Nixon obtained
3 “actual knowledge” of DC Solar’s wrongdoing until March 2017. *See id.* ¶¶ intro., 183,
4 281, 296. The DC Solar deals out of which the 2019 proof of claim arose would have
5 closed after March 2017. But 25 of the 32 transactions in which the Trustee alleges Nixon
6 was involved closed ***before*** March 2, 2017. *See id.* ¶ 122. Importantly, the Trustee ***never***
7 asked Nixon partner Forrest Milder about the firm’s proof of claim in the Rule 2004
8 examination she took while investigating her counterclaims.
9 • Ultimately, the Court need look no further than the fact that Nixon’s proof of claim sought
10 about \$100,000 in unpaid fees and the Trustee seeks “hundreds of millions of dollars in
11 damages.” *Id.* ¶ intro. It cannot be the case that resolving whether Nixon was entitled to
12 \$100,000 in early 2019 “would necessarily result in the resolution of [the Trustee’s]
13 counterclaim[s].” *Stern*, 564 U.S. at 497.

14 Courts analyzing the extent of intertwinement between a counterclaim and a proof of
15 claim sometimes apply the test for collateral estoppel and res judicata to inform their decision.
16 See, e.g., *In re Windstream Holdings, Inc.*, No. 19-22312 (RDD), 2020 WL 1304147, at *8
17 (Bankr. S.D.N.Y. Mar. 17, 2020); *In re AWTR Liquidation Inc.*, 547 B.R. 831, 837 (Bankr. C.D.
18 Cal. 2016). Here, those principles cut decisively in favor of requiring Article III adjudication.
19 Collateral estoppel in the Ninth Circuit requires, among other things, that “the issue necessarily
20 decided at the previous proceeding is *identical* to the one which is sought to be relitigated.”
21 *Wabakken v. California Dep’t of Corr. & Rehab.*, 801 F.3d 1143, 1148 (9th Cir. 2015) (emphasis
22 added and citation omitted). Not even the Trustee has argued that Nixon’s proof of claim and the
23 Trustee’s state-law counterclaims raise *identical* issues—nor could she. See Mot. 15.

24 It is thus both undisputed and indisputable that the Trustee's state-law counterclaims are
25 *Stern* claims. Accordingly, they must be heard by the jury in an Article III court—unless Nixon
26 has consented to final adjudication by the bankruptcy court. As explained next, Nixon has not
27 done so.

1 2. **As a matter of law, Nixon's filing of a proof of claim has no bearing
2 whatsoever on whether it consented to adjudication in the Bankruptcy
3 Court, which it did not.**

4 Because the Trustee's state-law counterclaims are *Stern* claims, the bankruptcy court can
5 finally decide them only if Nixon has consented. Recognizing that Article III protections "help to
6 ensure the integrity and independence of the Judiciary," the Supreme Court held in *Wellness*
7 *International* that a litigant's consent to final adjudication by the bankruptcy court must be
8 "knowing[] and voluntar[y]." 575 U.S. at 668-669. "[T]he key inquiry is whether 'the litigant or
9 counsel was made aware of the need for consent and the right to refuse it, and still voluntarily
10 appeared to try the case' before the non-Article III adjudicator." *Id.* at 685 (quoting *Roell v.
11 Withrow*, 538 U.S. 580, 590 (2003)). This rigorous test of voluntariness ensures that "the Article
12 III right is substantially honored." *Id.* at 684. Under that test, it is clear that Nixon has **not**
13 consented to final bankruptcy-court adjudication of the Trustee's state-law tort claims.

14 a. The Trustee's one and only basis for arguing consent is the fact that Nixon filed a proof
15 of claim in the bankruptcy proceedings. That argument fails as a matter of law because *Stern*
16 established that a proof of claim is **never fully voluntary** and therefore can **never imply consent**
17 to bankruptcy-court jurisdiction. At most, a proof of claim may have some bearing on the
18 threshold question whether the claim at issue is a *Stern* claim. But in the subsequent "consent"
19 inquiry, a proof of claim carries no weight.

20 In *Stern*, Pierce Marshall had filed a proof of claim before the debtor, Vickie Marshall,
21 filed her counterclaim. 564 U.S. at 470. If that had been enough to prove Pierce's consent to
22 bankruptcy-court jurisdiction, the remainder of the Court's analysis would have been superfluous:
23 The Supreme Court's discussion would have begun and ended with the proof of claim. But it did
24 not. The Court in fact stated that "Pierce did not truly consent to resolution of Vickie's claim in
25 the bankruptcy court proceedings." *Id.* at 493. This was so without regard to the **contents** of
26 Pierce's proof of claim. Rather, the Court reached that conclusion on the ground that Pierce "**had**
27 **nowhere else to go if he wished to recover from Vickie's estate.**" *Id.* A proof of claim, in other
28 words, can **never** be deemed fully voluntary, because a bankrupt's creditor has "nowhere else to
go" but the bankruptcy court. Indeed, the Court later recognized in *Wellness International* that

1 “*Stern* was premised on ***nonconsent*** to adjudication by the Bankruptcy Court.” 575 U.S. at 682
 2 (emphasis added). Put simply, in light of *Stern* and *Wellness International*, “a creditor does
 3 not consent to final adjudication of a debtor’s common law counterclaim merely by filing
 4 a proof of claim.” *In re FKF 3, LLC*, No. 13-CV-3601 (KMK), 2016 WL 4540842, at *10 n.4
 5 (S.D.N.Y. Aug. 30, 2016).⁴ By simply filing a proof of claim, Nixon likewise has not consented
 6 here.

7 Unsurprisingly, therefore, the Trustee finds herself unable to cite even one decision
 8 striking a jury demand on a *Stern* claim where the only alleged basis for consent was submission
 9 of a proof of claim. And the cases that the Trustee does cite are far afield. Remarkably, ***every***
 10 ***single case*** on which the Trustee relies predates *Stern* and *Wellness International*.⁵ That alone is
 11
 12
 13
 14

15 ⁴ The Trustee relies on *In re EPD Inv. Co., LLC*, 821 F.3d 1146 (9th Cir. 2016), for its
 16 observation that one of the defendants, Poshow Ann Kirkland, had consented to bankruptcy-court
 17 jurisdiction by filing a proof of claim. *Id.* at 1150 n.2. But *EPD* is inapposite. Poshow was not the
 18 party challenging jurisdiction on appeal; thus, the parties were not litigating whether she had
 19 consented. *Id.* at 1150. Rather, they were litigating another defendant’s motion to compel
 20 arbitration. The court’s holding was that, for purposes of the motion to compel, it did not matter
 whether the bankruptcy court could render a ***final*** judgment, which makes the footnote about
 consent *dicta*. *Id.* at 1150-51. The statement that Poshow consented to bankruptcy court
 jurisdiction was “unnecessary” to the court’s judgment (and apparently not even litigated) and is
 therefore not binding. Cf. *United States v. Anekwu*, 695 F.3d 967, 975 (9th Cir. 2012).

21 ⁵ See *In re PNP Holdings Corp.*, 184 B.R. 805, 806 (B.A.P. 9th Cir. 1995), *aff’d*, 99 F.3d 910
 22 (9th Cir. 1996) (cited at 12); *Katchen v. Landy*, 382 U.S. 323 (1966) (cited at 12); *In re G.I.*
Indus., Inc., 204 F.3d 1276 (9th Cir. 2000) (cited as 12); *Ta Chong Bank Ltd. v. Hitachi High*
Techs. Am., Inc., 610 F.3d 1063 (9th Cir. 2010) (cited at 12); *Maring v. PG Alaska Crab Inv. Co.,*
LLC, No. C05-0326-JCC, 2007 WL 9775428 (W.D. Wash. Oct. 2, 2007) (cited at 13); *In re*
Advanced Rods, Inc., No. OR-04-1536-RKMo, 2005 WL 6960214 (B.A.P. 9th Cir. June 27,
 2005) (cited at 13); *In re Frost, Inc.*, 145 B.R. 878 (Bankr. W.D. Mich. 1992) (cited at 13); *In re*
McClelland, 332 B.R. 90 (Bankr. S.D.N.Y. 2005) (cited at 14); *In re CBI Holding Co., Inc.*, 529
 F.3d 432 (2d Cir. 2008) (cited at 14). The Trustee quotes (at 13 n.44) a single 2020 case from the
 bankruptcy court in the Eastern District of Virginia, see *In re Toys "R" Us, Inc.*, 615 B.R. 96, 102
 (Bankr. E.D. Va. 2020), but that decision was merely quoting a 2004 opinion by another court,
 see *In re Adelphia Commc’ns Corp.*, 307 B.R. 404, 419 (Bankr. S.D.N.Y. 2004), amid a personal
 jurisdiction discussion. It has no persuasive value here.

1 reason enough to discount those authorities as reliable statements of current law.⁶ But even taken
 2 at face value, the Trustee's cases establish only the unremarkable proposition that a bankruptcy
 3 court can finally decide *Stern* claims where they "are integral to, and directly affect the allowance
 4 of, the proof of claim." *In re CBI*, 529 F.3d at 468; *see also Ta Chong Bank*, 610 F.3d at 1069; *In*
 5 *re G.I. Indus.*, 204 F.3d at 1279-80; *In re Advanced Rods*, 2005 WL 6960214, at *5; *In re*
 6 *McClelland*, 332 B.R. at 94-95. As explained above, that is not so here.

7 In short, as a matter of law, Nixon's proof of claim is simply irrelevant to the question
 8 whether it consented to final adjudication by the bankruptcy court.

9 **b.** Absent express consent (which no one argues occurred here), courts look to a litigant's
 10 course of conduct *in the adversary proceeding* to ascertain implied consent. *Stern*, 564 U.S. at
 11 480-481; *In re FKF*, 2016 WL 4540842, at *10 n.4. *Stern* provides a useful illustration of what
 12 consent looks like. In that matter, not only did Vickie Marshall, the debtor, file a state-law tort
 13 claim against Pierce Marshall, but Pierce also filed a state-law defamation claim against Vickie.
 14 564 U.S. at 481. The Supreme Court held that Pierce had consented to the bankruptcy court's
 15 final adjudication of that claim—*not* simply because he had filed a proof of claim, but because he
 16 had advised the bankruptcy court that he agreed with Vickie that the bankruptcy court should
 17 determine the value of his claim. *Id.* Moreover, the Supreme Court observed that "Pierce
 18 identifie[d] no point in the record where he argued to the Bankruptcy Court that it lacked the
 19 authority to adjudicate his proof of claim because the claim sought recompense for a personal
 20 injury tort." *Id.* In fact, "Pierce repeatedly stated to the Bankruptcy Court that he was happy to
 21 litigate there," so the Supreme Court concluded that it would "not consider his claim to the
 22 contrary, now that he is sad." *Id.* at 482.

23 Other decisions have found implied consent where, for example, the defendant (1)

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 25 ⁶ "In the Ninth Circuit, where intervening Supreme Court authority 'undercut[s] the theory or
 26 reasoning underlying a prior circuit precedent in such a way that the cases are clearly
 27 irreconcilable,' a district court 'should consider itself bound by the intervening higher authority
 28 and reject the prior circuit precedent as having been effectively overruled.'" *United States v. Bell*,
 158 F. Supp. 3d 906, 914–15 (N.D. Cal. 2016) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)).

1 sandbagged the court, first “s[eeing] affirmative relief from the bankruptcy court believing it
 2 might win and then cr[y]ing foul over the court’s entry of final judgment when it los[t],” *True*
 3 *Traditions, LC v. Wu*, 552 B.R. 826, 837 (N.D. Cal. 2015); or (2) “actively appear[ed] before the
 4 Court at various hearings” without “rais[ing] a proper objection,” *In re Breland*, No. 09-11139-
 5 JCO, 2016 WL 3193819, at *2 (Bankr. S.D. Ala. May 27, 2016); or (3) failed to file a motion,
 6 required by the local rules, asking the bankruptcy court to determine that the adversary
 7 proceeding was not finally decidable by the bankruptcy court, *In re Cole*, No. 16-30960, 2017
 8 WL 486920, at *2 (Bankr. W.D.N.C. Feb. 6, 2017).

9 Nixon’s conduct here stands in stark contrast to that of Pierce Marshall and the other
 10 litigants who gave their implied consent to bankruptcy-court adjudication of *Stern* claims. Since
 11 the filing of this adversary proceeding, Nixon has clearly and consistently maintained that it does
 12 **not** consent to final adjudication in bankruptcy court, taking care to say so in its initial scheduling
 13 stipulation, in its motions to withdraw the reference and to transfer, and in its jury demand filed in
 14 compliance with Local Rule 9015. *See supra* 3. Nixon’s actions here have been neither dilatory
 15 nor motivated by gamesmanship. Its conduct far more closely resembles that at issue in *In re*
 16 *FKF*, where the court found a lack of consent because the defendant’s “amended answer
 17 demanded a jury trial and raised the Court’s lack of constitutional authority as an affirmative
 18 defense, . . . and where he filed his initial motion to withdraw the reference less than two months
 19 after filing the amended answer.” 2016 WL 4540842, at *10 n.4.

20 Here, therefore, the Trustee cannot seriously contend that Nixon consented to entry of
 21 final judgment in this Court. Nixon’s conduct since the filing of this matter is unequivocal: It has
 22 not consented to final adjudication outside of an Article III forum. Finding consent here would
 23 eviscerate the requirement that consent be “knowing and voluntary”—i.e., that “the litigant or
 24 counsel was made aware of the need for consent and the right to refuse it, and still voluntarily
 25 appeared to try the case before the non-Article III adjudicator.” *Wellness Int’l*, 575 U.S. at 674
 26 (citation omitted).

27
 28

1 **3. If the Court finds the question presented here even close, it must err
2 on the side of preserving Nixon's jury-trial right.**

3 If the Court determines that the question presented here is close—which it isn't—
4 precedent requires it to err on the side of denying the Trustee's motion. At least three principles
5 support this conclusion.

6 ***First***, the Ninth Circuit has admonished that “[i]n close cases, a court should err on the
7 side of preserving the right to a jury trial.” *Granite Rock Co. v. Int'l Bhd. of Teamsters, Freight,*
8 *Constr., Gen. Drivers, Warehousemen & Helpers, Loc. 287 (AFL-CIO)*, 649 F.3d 1067, 1069 (9th
9 Cir. 2011); *see also see also Composite Res. Inc. v. Recon Med. LLC*, No. 2:17-CV-01755-MMD-
10 VCF, 2021 WL 4941991, at *2 (D. Nev. Oct. 22, 2021) (same). The right to a jury trial “has
11 occupied an exceptional place in the history of the law.” *Wilmington Tr. v. U.S. Dist. Ct. for Dist.*
12 *of Hawaii*, 934 F.2d 1026, 1028 (9th Cir. 1991). Accordingly, “the right to grant mandamus to
13 require jury trial where it has been improperly denied is settled.” *In re Tech. Licensing Corp.*, 423
14 F.3d 1286, 1288 (Fed. Cir. 2005) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511
15 (1959)); *see also In re Cty. of Orange*, 784 F.3d 520, 526 (9th Cir. 2015); *Wilmington*, 934 F.2d
16 at 1028 (9th Cir. 1991). A court in this district recently resolved a close question regarding a
17 party’s entitlement to a jury trial in favor of preserving that right, because the court did “not wish
18 to invite mandamus proceedings” by declaring that the trial would be a bench trial. *Composite*
19 *Res.*, 2021 WL 4941991, at *2.

20 ***Second***, similar tie-breaking principles govern in other contexts in which waiver or
21 forfeiture of constitutional rights are at issue. The Supreme Court has explained that, for
22 “[w]aivers of constitutional rights to be effective . . . [they] must be deliberately and
23 understandingly made and can be established only by clear, unequivocal, and unambiguous
24 language.” *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 332 (1964). Thus, for example,
25 waivers of the right to counsel in favor of self-representation,⁷ Fourth Amendment protections

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⁷ *United States v. Keen*, 104 F.3d 1111, 1114 (9th Cir. 1996), as amended on denial of reh’g (Jan.
28 2, 1997).

from warrantless searches,⁸ and the protections offered by the Speech or Debate Clause⁹ must all be unequivocal. The high bar for finding relinquishment of a constitutional right is not just for individuals, either. A state's waiver of sovereign immunity must also be unequivocal.¹⁰ Here, where the Trustee rests her waiver argument entirely on the 2019 proof of claim, there is no sound basis to conclude that Nixon waived its right to a jury trial.

Third, the Supreme Court has long insisted that even modest usurpations of Article III powers are to be guarded against assiduously. That comes not just from *Stern* and its insistence that Congress not "chip away at the authority of the Judicial Branch," 564 U.S. at 502–03, but also from its earlier decision in *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, where it rejected an argument that "would require that we replace the [separation-of-powers] principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government." 458 U.S. 50, 74 (1982). The Court recently reiterated the point that "Congress cannot 'confer the Government's 'judicial Power' on entities outside Article III,'" *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372–73 (2018) (citing *Stern*, 564 U.S. at 484)). Thus, absent *clear* indication that the Trustee's claims do not require Article III adjudication, or that Nixon consented to adjudication outside of an Article III court, the Court should preserve Article III adjudication and Nixon's right to a jury trial.

20 **4. Nixon's withdrawal of its proof of claim further undercuts the 21 Trustee's motion.**

22 As set forth at greater length in the motion filed in the main case, Nixon has sought to
23 withdraw its proof of claim. Dkt. 2985, *In re Double Jump*. The Trustee thus devotes the final two
24 pages of her motion to arguing that "a claimant's withdrawal of a proof of claim *after* the trustee
25 files an adversary proceeding (counterclaim) against that claimant has no effect on this

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27 ⁸ *United States v. Remolif*, 227 F. Supp. 420, 422–23 (D. Nev. 1964).

28 ⁹ *United States v. Helstoski*, 442 U.S. 477, 492 (1979).

29 ¹⁰ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

1 Bankruptcy Court's jurisdiction." Mot. 16-17. As an initial matter, the Court need not reach that
 2 argument because, for the reasons discussed above, the bankruptcy court never had the authority
 3 to finally decide the Trustee's state-law tort claims, since they are *Stern* claims and Nixon has not
 4 consented to have them adjudicated in this Court. That would be so even if the proof-of-claim had
 5 not been withdrawn.

6 The Trustee's argument is also wrong. "*Stern* suggests that the relevance of filing a proof
 7 of claim to the Article III analysis is limited by its practical implications for the claims resolution
 8 process." *In re FKF*, 2016 WL 4540842, at *8 n.3. That is, "the justification for the 'necessarily
 9 resolved' rule is practical: where a Trustee's counterclaims are resolved by the bankruptcy court
 10 in the process of adjudicating a creditor's proof of claim, the creditor has 'no basis' for
 11 demanding a second adjudication of those claims in an Article III court." *Id.* (citing *Stern*, 564
 12 U.S. at 496). But here, like in *In re FKF*, Nixon's decision to abandon its proof of claim means
 13 that ***nothing*** will be resolved in the claims-allowance process. *Id.* That process simply is not
 14 going to happen. It follows that Nixon's initial filing of a proof of claim cannot and should not
 15 affect Nixon's entitlement to Article III adjudication. *See also In re Maui Indus. Loan & Fin. Co.*,
 16 No. 10-00235, 2012 WL 405056, at *2 (Bankr. D. Haw. Feb. 8, 2012) ("Mr. Albright should be
 17 permitted to withdraw his proof of claim and preserve his right to a jury trial.").

18 The Trustee relies almost exclusively on subject-matter-jurisdiction cases for the
 19 proposition that the time of filing "is the only time that matters" for jurisdictional purposes. *See*
 20 Mot. 16-17 (citing *In re Crystal Cascades Civ., LLC*, 415 B.R. 403, 408 n.8 (B.A.P. 9th Cir.
 21 2009)); *Double Eagle Energy Servs., L.L.C. v. MarkWest Utica EMG, L.L.C.*, 936 F.3d 260, 263
 22 (5th Cir. 2019); *In re Toledo*, 170 F.3d 1340, 1346 n.8 (11th Cir. 1999)).¹¹ But subject-matter
 23 jurisdiction is not the issue here: Neither party disputes that 28 U.S.C. § 1334 authorizes a federal
 24

25 ¹¹ The Trustee also cites in passing several other decisions that are equally inapplicable here.
 26 *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union,*
AFL-CIO, CLC v. Shell Oil Co., 602 F.3d 1087, 1091 (9th Cir. 2010) (CAFA jurisdiction); *In re*
Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1236–37 (9th Cir. 2008) (diversity jurisdiction);
Carlson v. Gatestone & Co. Int'l Inc., No. 17-CV-01818-BLF, 2017 WL 2615764, at *2 (N.D.
 27 Cal. June 16, 2017) (attorney's fees in removed actions).

court to hear the Trustee’s state-law counterclaims. Rather, the question before the Court is whether Nixon’s 2019 proof of claim affected its right to final adjudication by an Article III court. The requirements of Article III differ in material ways from statutory subject-matter jurisdiction. “Article III jurisdiction . . . must be present throughout all stages of the proceedings.” *Cohen v. United States*, 210 F.3d 382 (9th Cir. 2000) (TABLE). The time of filing is therefore *not* “the only time that matters” for purposes of Article III. *DeFunis v. Odegaard*, 416 U.S. 312, 319-320 (1974) (mootness deprives court of Article III jurisdiction); *Intell. Prop. Dev., Inc. v. TCI Cablevision of California, Inc.*, 248 F.3d 1333, 1342 (Fed. Cir. 2001) (district court “divested” of Article III jurisdiction by subsequent events).

Apparently recognizing that authority for her position is scant, the Trustee places great weight upon *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC*, 597 B.R. 466 (Bankr. S.D.N.Y. 2019), where a bankruptcy court concluded that “the withdrawal of the Defendants’ Claims did not strip the Court of its equitable jurisdiction that attached at the time-of-filing.” *Id.* at 486. But there, the Trustee’s claims were not *Stern* claims—just claims to avoid and recover excess transfers—well within the bankruptcy court’s constitutionally permissible jurisdiction. 597 B.R. at 473-476; *see also In re Bernard L. Madoff Inv. Sec. LLC*, 612 B.R. 257, 267 (S.D.N.Y. 2020). As a result, the bankruptcy court’s retention of jurisdiction, even once the defendant sought to withdraw its proof of claim, did not present “constitutional concerns regarding Congress’s reallocation of the judicial power,” because “the Trustee’s rights ar[o]se from Congress’s exercise of its own constitutional role in the administration of bankruptcy.” *Id.* at 270. That is not the case here, where, just as in *Stern*, state-law tort claims outside the bankruptcy court’s jurisdiction are at issue.

In sum, the bankruptcy court never had authority to finally decide the Trustee’s state law counterclaims, but now that Nixon has abandoned its proof of claim, it should be especially clear that an Article III court must preside.

B. Nixon maintains a jury-trial right on the fraudulent-conveyance claims.

Besides her common-law tort claims, the Trustee includes two fraudulent-conveyance claims. *See* Compl. counts V-VI. Like the Trustee’s state-law counterclaims, fraudulent-

conveyance actions are designated “core” proceedings by the statute. 28 U.S.C. § 157(b)(2)(H). But, also like the Trustee’s counterclaims, fraudulent-conveyance claims “cannot be decided outside the Article III courts.” *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 562 (9th Cir. 2012) (assuming without deciding that fraudulent-conveyance claims are *Stern* claims), *aff’d*, 573 U.S. 25 (2014); *see also In re Rhodes Cos., LLC*, No. 2:12-CV-01272-MMD, 2012 WL 5456084, at *4 (D. Nev. Nov. 7, 2012) (“[A] court deciding a fraudulent conveyance action exercises its Article III judicial power, and the Seventh Amendment entitles a litigant to a jury trial on such claims.”). The Ninth Circuit so concluded in *Bellingham* even though the “source” of the fraudulent conveyance claim was the Bankruptcy Code. 702 F.3d at 564.

The filing of a proof of claim, despite all the great weight placed upon it by the Trustee (at 11), does not alter the conclusion. The Ninth Circuit in *In re Bellingham* indicated that *Stern* required treating fraudulent-conveyance claims against a creditor no differently than state-law counterclaims: Only in the event that the fraudulent-conveyance claims “necessarily ha[ve] to be resolved in the course of the claims-allowance process” does Article III permit bankruptcy courts to finally decide them. *Bellingham*, 702 F.3d at 564. Just as with the Trustee’s state-law tort claims, her fraudulent-transfer claims would not *necessarily* be decided in determining whether to allow Nixon’s proof of claim. Exhibit 7 to the Trustee’s Complaint lists certain transfers that she wishes to avoid. But they are, by definition, different payments for different legal work than the unpaid invoices that gave rise to Nixon’s proof of claim. It thus cannot be the case that an inquiry into whether Nixon is entitled to payment of those unpaid invoices will *necessarily* resolve whether the transfers listed in Exhibit 7 were fraudulent.

Nixon has not consented to final adjudication of the fraudulent-conveyance claims in bankruptcy court. The same consent standard that applies to the state-law counterclaims applies here. *See, e.g., In re Bellingham*, 702 F.3d at 568. Cases finding that a fraudulent-transfer defendant consented to bankruptcy-court jurisdiction have involved far clearer indicia of consent than are present in this case. In *In re Bellingham*, for instance, the challenger “did not simply fail to object to the bankruptcy judge’s authority to enter final judgment in the fraudulent conveyance action; it affirmatively assented to suspend its demand for a jury trial in district court to give the

bankruptcy judge an opportunity to adjudicate the claim.” 702 F.3d at 568. That party in fact “did not raise a constitutional objection to the bankruptcy court’s entry of final judgment in favor of the Trustee until after the briefing in this appeal was complete, when it filed a motion to vacate the bankruptcy court’s judgment on the eve of oral argument.” *Id.* Similarly, in *In re Pringle*, the defendant “actively participated in the fraudulent transfer proceeding” by “answering the complaint, participating in discovery, [and] contesting issues at trial.” 495 B.R. 447, 457–58 (B.A.P. 9th Cir. 2013). And in *In re Beshmada, LLC*, defendant “did not object to the bankruptcy court’s jurisdiction, even though he was actively engaged in litigating the matter” until more than a year after the proceeding was filed. CV 13-8342 GAF, 2014 WL 4060262, at *4 (C.D. Cal. Aug. 18, 2014). In this case, as explained above (at 3), Nixon has “consistently expressed [its] objection to the Bankruptcy Court’s jurisdiction and challenged its authority to enter a final judgment before it issued any decision.” *In re Cooper*, No. EDCV 18-02279 JGB, 2018 WL 11277403, at *2 (C.D. Cal. Nov. 28, 2018) (finding no express or implied consent).

In short, because Article III does not grant the bankruptcy court authorization to finally decide the Trustee’s fraudulent-conveyance claims, and Nixon has not consented to this Court’s doing so, those claims, like the state-law counterclaims, must be decided by an Article III court.¹²

C. Because the Trustee’s claims must be heard by an Article III court, the bankruptcy reference should be withdrawn.

The Supreme Court has held that the appropriate procedure for *Stern* claims is that set forth in 28 U.S.C. § 157(c)(1). *Exec. Benefits*, 573 U.S. at 37–38. Section 157(c)(1) permits parties to “submit proposed findings of fact and conclusions of law to the district court” for *de novo* review. *Id.* But “where a jury trial is required and the parties refuse to consent to bankruptcy jurisdiction, withdrawal of the case to the district court is appropriate.” *In re Cinematronics, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990); *In re Nady*, 138 B.R. 608, 610 (D. Nev. 1992) (recognizing that bankruptcy courts cannot preside of jury trials without consent). The procedure set forth by

¹² Because Nixon no longer intends to pursue its proof of claim, Count VIII in the Trustee’s complaint, for disallowance, is moot. The Court therefore need not reach the question whether Nixon has a jury-trial right on that claim for relief.

§ 157(c)(1) is also subject to § 157(d), which allows the district court to withdraw the bankruptcy reference at any time “for cause shown.”

Thus, if the Court agrees that the Trustee's state-law counterclaims and fraudulent-conveyance claims are *Stern* claims and that Nixon has not consented to final adjudication in the bankruptcy court, it must withdraw the reference and certify the matter for the district court. L.R. 9015(e). And for the reasons set forth in the pending motion to withdraw the reference, rather than waiting until "the matter is ready for trial," *id.*, the most prudent course is to withdraw the reference now.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the Trustee's motion to strike Nixon's jury demand.

Dated: February 4, 2022

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